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New York (State) Reports. Supreme Court.

# REPORTS

OF

# Cases in Law and Equity

DETERMINED IN THE

# SUPREME COURT

OF THE

# STATE OF NEW-YORK.

BY OLIVER L. BARBOUR.
Counsellor at Law.

VOL. XX.

NEW YORK.
BANKS & BROTHERS, LAW PUBLISHERS,
No 144 NASSAU STREET.
ALBANY: 475 BROADWAY.
1883.

RR
KFN
5049
.59B3
v.20

FL
9
NewY71
B2342
1848
v.20

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# JUSTICES OF THE SUPREME COURT,

DURING THE YEARS 1854 AND 1855.

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Class 1. HENRY P. EDWARDS.*
" " EDWARD P. COWLES.†
" 2. WILLIAM MITCHELL.‡
" 3. JAMES J. ROOSEVELT.¶
" 4. ROBERT H. MORRIS.
" " THOMAS. W. CLERKE.

SECOND JUDICIAL DISTRICT.

" 1. SEWARD BARCULO.**
" " GILBERT DEAN.†† ‡‡
" 2. JOHN W. BROWN.‡
" 3. SELAH B. STRONG.¶
" 4. WILLIAM ROCKWELL

THIRD JUDICIAL DISTRICT.

" 1. MALBONE WATSON.
" 2. AMASA J. PARKER.‡
" 3. WILLIAM B. WRIGHT.¶
" 4. IRA HARRIS.

FOURTH JUDICIAL DISTRICT.

" 1. AUGUSTUS C. HAND.‡‡
" 2. DANIEL CADY.‡ ¶¶
" " AUGUSTUS BOCKES.***
" 3. CORNELIUS L. ALLEN.¶
" 4. AMAZIAH B. JAMES.

FIFTH JUDICIAL DISTRICT.

CLASS 1. WILLIAM F. ALLEN.
" 2. FREDERICK W. HUBBARD.‡
' 3. DANIEL PRATT.¶
' 4. WILLIAM J. BACON.

SIXTH JUDICIAL DISTRICT.

" 1. SCHUYLER CRIPPEN.‡‡
" 2. WILLIAM H. SHANKLAND.‡
" 3. HIRAM GRAY.¶
" 4. CHARLES MASON.

SEVENTH JUDICIAL DISTRICT.

" 1. SAMUEL L. SELDEN.
" 2. THOMAS A. JOHNSON.‡
" 3. THERON R. STRONG.¶
" 4. HENRY WELLES.

EIGHTH JUDICIAL DISTRICT.

" 1. RICHARD P. MARVIN.‡‡
" 2. LEVI F. BOWEN.‡
" 3. JAMES MULLETT.¶
" 4. BENJAMIN F. GREENE.

* Died Feb. 28, 1855.

† Appointed by the Governor to fill the vacancy caused by the death of Judge Edwards.

‡ Presiding Justice in 1854.

¶ Presiding Justice in 1855.

** Died June 21, 1854.

†† Appointed by the Governor to fill the vacancy occasioned by the death of Judge Barculo.

‡‡ Sitting in the Court of Appeals in 1855.

¶¶ Resigned January 1, 1855.

*** Appointed by the Governor to fill the vacancy occasioned by the resignation of Judge Cady.

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# CASES

IN

# Law and Equity

IN THE

# SUPREME COURT

OF THE

# STATE OF NEW YORK.

## HANNAH M. WELTON *vs.* D. DIVINE.

The presumption that he who supplies the money to make a purchase intends it for his own benefit, rather than that of another, does not apply in cases, like that of parent and child or husband and wife, where the purchase may fairly be deemed to have been made for another from motives of natural love and affection.

The presumption, in such cases, is that the purchase is intended as an *advancement*, unless the contrary is established by proof.

Therefore where a purchase is made by a husband, and the deed taken in the name of his wife, a resulting trust cannot be established, in favor of the husband, without some evidence to rebut the presumption that the deed was intended as a provision in the wife's favor.

THIS was an action to recover the possession of a farm in the town of Rochester, in the county of Ulster. It was tried at the Ulster circuit, in November, 1852, before Mr. Justice WRIGHT. The plaintiff gave in evidence a deed of the premises to herself from Peter Elmendorf and wife, bearing date the 26th of No-

vember, 1829. The consideration expressed in the deed was $500 paid by the grantee. Also, the record of the appointment of trustees of the estate of Enos Welton, the husband of the plaintiff, as an absconding debtor, dated February 28, 1842. Also a deed from the trustees to Edmond Brugh, dated July 1, 1842, conveying all the estate, right, title and interest of Enos Welton in the premises. The defendant claimed to hold the premises under this title.

The plaintiff further proved by her son that she and her husband kept separate purses; that she had money which she concealed from her husband. That the money with which the land was purchased was furnished by her to her husband when he went to make the purchase. Upon his cross-examination the same witness stated that he knew of no way the plaintiff had of getting money, except from her husband. At the time of the commencement of this suit Enos Welton was dead.

The parties having rested, the court decided that the testimony established a resulting trust in favor of Enos Welton in the estate purchased in the name of Hannah M. Welton, and nonsuited the plaintiff. To this decision the plaintiff excepted. The cause was heard, at the general term, upon a motion for a new trial, upon a bill of exceptions.

*M. Schoonmaker*, for the plaintiff.

*H. Hogeboom*, for the defendant.

*By the Court*, HARRIS, J. It is by no means certain, from the testimony in the case, that Enos Welton furnished the money with which the land in question was purchased. But assuming this to be undisputed, it would not establish a resulting trust. The presumption that he who supplies the money to make a purchase intends it for his own benefit rather than that of another, does not apply in cases, like that of parent and child or husband and wife, where the purchase may fairly be deemed to be made for another from motives of natural love and affection. The presumption in such cases is, that the purchase is intended

as an *advancement*, unless the contrary is established by proof. (*Story's Eq. Jur.* §§ 1202 *to* 1204. *Crabb's Law of Real Property*, § 1786. *Jackson* v. *Matsdorf*, 11 *John.* 91. *Guthrie* v. *Gardner*, 19 *Wend.* 414.)

In this case, there is no evidence to rebut the presumption that the deed taken by the husband in the name of his wife was intended as a provision in her favor. Without such evidence a resulting trust could not be established. The nonsuit, therefore, should be set aside, and a new trial awarded, with costs to abide the event.

[Albany General Term, September 4, 1854. *Wright*, *Harris* and *Watson*, Justices.]

## Green *vs.* Telfair.

Whether matter contained in a publication is libellous or not, is a question for the decision of the court; but, if libelous, it is for the jury, and not the court, to say whether it is applicable to the plaintiff.

Thus where a libelous article did not point to any person in particular, but the plaintiff had expressly averred, in his complaint, that it was published of, and concerning himself, and he had proved some facts tending to sustain that averment; *Held*, that it should have been submitted to the jury to determine whether the libel was intended to apply to the plaintiff.

THIS was an action for libel and slander. It was tried at the Greene circuit, in November, 1852. The plaintiff was the keeper of the Greene county poor-house. The defendant was county physician, and also a coroner of the county. On the morning of the 4th of March, 1852, one Rebecca Southard, an invalid pauper, was found dead in her cell. An inquest was held by the defendant, at the instance of one of the superintendents of the poor. The jury found that the deceased "*came to her death sometime in the night of the 3d day of March*, 1852, *in consequence of the cold in her cell, and of a want of sufficient*

*clothing, bedding and proper care and attention.*" This inquest the defendant procured to be published in the two public newspapers printed in the village of Catskill. It was for this publication, together with some alleged slanderous charges in relation to the same subject, that this action was brought.

The plaintiff alleged, in his complaint, and proved upon the trial, that, on the 4th of March, 1852, and prior thereto, he was the keeper of the Greene county poor-house; and that the power of governing the establishment and superintending its general management was vested in him as such keeper, and that by the rules and regulations which had been adopted by the superintendents of the poor, it became, and was, his duty to provide reasonable and kind attention for all such infirm and invalid paupers as were in and about the house, and to furnish care, attention, bedding and all things necessary and suitable for their comfort. The plaintiff then alleged in his complaint, that the defendant, knowing the premises and intending to injure him in his employment as such keeper, and to cause it to be suspected and believed that he, the plaintiff, had conducted himself negligently, carelessly and improperly as such keeper, had wrongfully, injuriously and maliciously published *of and concerning him, the plaintiff, in the way of and in respect to his business and employment as such keeper*, and *of and concerning his conduct as such keeper*, and of and concerning the cause which produced the death of the said Rebecca Southard, a certain false, scandalous, malicious and defamatory libel, and then stated as such libel, the coroner's inquest as above set forth.

Upon the trial, the plaintiff's counsel claimed the right to have the question submitted to the jury, whether the averments of extrinsic facts contained in the complaint had not been established, and whether the defendant did not intend by the publication to charge that the death of Rebecca Southard had been occasioned by the neglect of the plaintiff as keeper, and whether such publication was not so understood by persons who read the article in the papers; which claim was overruled and denied by the judge, who ruled and decided that the article published did not point to any individual in particular; that it might as well

be said to point to the superintendents, or to other officers, nurses or servants of the establishment, as to the plaintiff, and that the plaintiff could not recover for such publication, in this action. To this decision the counsel for the plaintiff excepted.

The judge charged the jury that the words alleged in the complaint to have been spoken by the defendant, were admitted by the answer, and if these words related to the conduct of the plaintiff in his employment as keeper of the county poor-house, they were actionable, and the plaintiff would be entitled to their verdict, unless the justification had been sustained. The jury rendered a verdict in favor of the plaintiff for six cents damages. The plaintiff moved for a new trial upon a case and exceptions.

*L. Tremain*, for the plaintiff.

*H. Hogeboom*, for the defendant.

*By the Court*, HARRIS, J. It seems to have been assumed upon the trial, that the article published by the defendant, if it was intended to apply to the plaintiff, was libelous. The plaintiff had expressly averred that it was published of and concerning himself. He had proved some facts tending to sustain that averment. Whether or not the matter contained in the publication was libelous, was, indeed, a question for the decision of the court, but if libelous, it was for the jury, and not the court, to say whether it was applicable to the plaintiff.

The allegation in the article which constitutes the alleged libel is, that the pauper mentioned died from the want of proper care and attention. The charge implies that somebody had been guilty of culpable neglect. Who it was that had been thus guilty, cannot be ascertained from the article itself. The judge was right, therefore, when he said that "the article did not point to any individual in particular." No one by reading the article, without the knowledge of any other facts, would suspect that it was intended to censure the plaintiff, more than any other person. Yet the plaintiff insists that the charge of neglect, contained in the publication, was aimed at him, and at no one else

To show this, he resorts to facts which do not appear upon the face of the alleged libel. He shows that he was the keeper of the establishment in which the pauper was alleged to have frozen to death—that its government and general superintendence was committed to him—that by the rules and regulations which had been adopted by the superintendents of the poor for the government of the house, it had been declared to be his duty as keeper to provide seasonable and kind attention for the sick and infirm, and to make them comfortable. Upon such evidence the plaintiff claimed to have the case submitted to the jury upon the question whether, when the defendant published the article, he did not intend to impute to the plaintiff the blame of having, through neglect, caused the death of Mrs. Southard. I think the facts proved were sufficient to carry the cause to the jury upon that question. What their verdict might have been, it is unnecessary to conjecture. It is enough, upon the present occasion, to see that the evidence in the case was such as would have warranted the jury in finding that the censure, so clearly implied in the article published, was intended for the plaintiff.

The province fo the court as well as the jury, in cases like this, was clearly defined in *Van Vechten* v. *Hopkins*, (5 *John.* 211.) In that case, it was charged in the alleged libel, that certain leading federalists had entered into a corrupt coalition with the friends of Morgan Lewis to elect the latter governor. There was nothing upon the face of the publication from which it could be seen that the plaintiff was one of the parties intended. But the plaintiff had averred that the publication was made of and concerning himself, as well as other citizens of the state belonging to the political party denominated federalists, and, to show that he was intended, he had stated in his declaration, and proved upon the trial, certain facts which did not appear upon the face of the alleged libel. The cause was tried before Mr. Justice Spencer, who decided, as the learned judge who presided at the trial of this action decided, that the *libel itself* did not afford sufficient evidence that the plaintiff was intended. A new trial was granted, upon the ground that the judge at the circuit had

erred in not submitting it to the jury to say, from all the evidence in the case, whether it was not intended to charge the plaintiff as being one of the parties to the agreement set forth in the publication. "The averment of extrinsic matter in this declaration," said Van Ness J., in delivering the opinion of the court, "was for the purpose of showing that the libel was published, as it is expressly alleged to have been, of and concerning the plaintiff. *And whether it was so published or not, is a question of fact, which it is the province of the jury and not of the court to decide.*" And again he says, "There are cases in which, as in the case now under consideration, the words in themselves amount to a libelous charge upon some particular person, but where that person is so ambiguously described as that without the aid of extrinsic facts, his identity cannot be ascertained, but where, by the introduction of proper averments and a *colloquium*, the words may, notwithstanding, be rendered sufficiently certain to maintain an action. The certainty is arrived at by taking into consideration both the extrinsic facts stated in the averments and *colloquium* and the whole of the libel, all of which must be submitted to the jury, under the direction and charge of the judge, as in other cases." (*See also* 1 *Am. Leading Cases*, 3*d ed.* 138.)

Upon the ground, therefore, that it was error to withhold from the jury the decision of the question as to the application of the article published by the defendant, I am of opinion that there should be a new trial.

[Albany General Term, September 4, 1854. *Wright, Harris* and *Watson*, Justices.]

## HAGER and wife *vs.* DANFORTH.

Where a person goes to the house of another, for the purpose of serving a subpœna upon him, and the latter is in the house at the time, these circumstances amount to a legal license to enter: and if the person having the process finds the outer door open, and enters peaceably, he is lawfully there, and may use such force as is necessary to overcome any resistance he may meet with in the service of the subpœna; being liable only for an excess of violence, beyond what is necessary to overcome the resistance.

The fact that the person having the process is ordered by the wife of the party sought to be served, to leave the house, will not render him a trespasser in proceeding to serve the subpœna

APPEAL from an order made at a special term, denying a new trial. The action was brought to recover damages for an assault and battery alleged to have been committed upon Mrs. Hager. It was tried at the Schoharie circuit, in September, 1852, before Mr. Justice WRIGHT. It appeared upon the trial, that in August, 1851, a suit was pending before Henry R. Briggs, esquire, a justice of the peace, in which the defendant in this action was plaintiff and the plaintiff, Daniel J. Hager, was defendant. On the day upon which the suit was to be tried, the defendant Danforth procured from the justice a subpœna for the plaintiff Hager, and proceeded to his house for the purpose of serving the same. Finding the kitchen door open, he entered, but was met and resisted by Mrs. Hager. Hager was up stairs at the time, lathing. The defendant, in attempting to force his way to the stairs, against the resistance of the wife, choked her and threw her back against the catch of a door, and slightly bruised her. When the defendant first entered, Mrs. Hager ordered him out of the house, and he replied that he had a subpœna to serve on Hager, and pressed on towards the door leading to the chamber. At length the husband came down stairs, and the defendant served the subpœna upon him, and soon after left the house. The judge charged the jury that a license to enter the house for the purpose of serving the subpœna was to be implied, but that, "*after Mrs. Hager had ordered the defendant out, the subpœna was not a justification or protection to him in pressing forward and, when resist-*

*ed in his advance, using force to serve it.*" To this part of the charge, the defendant's counsel excepted. The jury found a verdict in favor of the plaintiff for $250. The defendant, upon a case, moved at a special term, for a new trial, which motion was denied. From the order denying a new trial, he brought an appeal to the general term.

*L. Tremain*, for the plaintiffs.

*H. Hogeboom*, for the defendant.

*By the Court*, HARRIS, J. The defendant went to the plaintiff's house with process which he was authorized by law to serve. (2 *R. S.* 240, § 82.) The person upon whom he was to make the service, was in the house. These facts amounted to a legal license, and, having found the door open, and entered peaceably. the defendant was lawfully there. Deriving his authority to be there from the law, and not from the consent of the plaintiffs, he was under no obligation to obey Mrs. Hager when she ordered him to leave. Not having conferred upon him his license, she had no power to revoke it. He was as rightfully there after he had been directed to leave, as before. I know of no duty which bound him to desist from the execution of the lawful purpose which had brought him there. If his taste led him to encounter the vituperation and violence of such a woman as he met there, it was his right to do so. To the extent, therefore, that the force used by the defendant was necessary to overcome the unlawful resistance he met in the service of the subpœna, it was lawful. Mrs. Hager was the wrongdoer, and not the defendant. If he used more force than was necessary to enable him to accomplish his purpose, to that extent he is liable as a wrongdoer.

The jury were led to understand, upon the trial, that after Mrs. Hager had ordered the defendant out, the subpœna furnished him no justification or protection. In effect, they were instructed that by remaining, after having been ordered to leave, the defendant became a trespasser. In this, they were

misled, and the result was a verdict against the defendant to an amount entirely unwarranted by the evidence.

The jury ought to have been told that, inasmuch as the defendant had entered the house in a peaceable manner, under a license given him by law, he had a right to remain there until he had effected the service of the subpœna; that Mrs. Hager, by resisting the defendant in making such service, was herself guilty of an unlawful act, and that the defendant was justified, notwithstanding such resistance, in using all the force necessary to enable him to serve the subpœna, and that he was only liable for any excess of violence used by him more than was necessary to overcome the resistance with which he met. I am of opinion, therefore, that the order of the special term should be reversed, and that a new trial should be granted, with costs to abide the event.

[Albany General Term, September 4, 1854. *Wright, Harris* and *Watson*, Justices.]

20 18
2L 494
32h 518
32h 520
51h 510
20 18
65h 139

## Cole *vs.* Moffitt.

Upon the foreclosure of a mortgage by advertisement and sale under the statute, a copy of the notice of sale must be served upon the mortgagor, if he is living, or upon his personal representatives if dead; otherwise there can be no valid foreclosure.

If the party alleging the validity of the proceedings would show an excuse for not serving the mortgagor with notice, he must prove the death of the mortgagor, by legal evidence, and not by mere hearsay or reputation

THIS action was brought to recover the possession of certain real estate situate in the town of Stephentown, in the county of Rensselaer. It was tried at the Rensselaer circuit, in February, 1853, before Mr. Justice Parker. The plaintiff claimed title to the premises under a statute foreclosure of a mortgage executed by Israel A. Adams. Subsequent to the execution of the

mortgage, Adams had conveyed the premises to Ralph Moffitt, whose interest had been sold under a judgment against him and purchased by the defendant.

The plaintiff gave in evidence a notice of sale, in the usual form, stating that the premises would be sold by virtue of the power contained in the mortgage, at the court house in Troy, on the 2d day of November, 1850, and proved the publication of the notice in a newspaper, printed in the county, once a week for twelve weeks. Also that the original notice together with a notice of the postponement of the sale until the 30th of November, 1850, which last notice bore date the first day of November, 1850, was published in the same paper. Also, that the original notice and the notice of postponement, and a second notice stating that the sale had been postponed until the 22d day of March, 1851, which last notice bore date the 24th day of December, 1850, had been published "according to law up to the 22d of March, 1850."

The plaintiff also gave in evidence the affidavit of the attorney who conducted the proceedings upon the foreclosure, stating that, on the 24th day of December, 1850, he affixed a copy of the notice, and of the several notices of postponement, upon the outer door of the court house. Also, another affidavit of the attorney stating the facts attending the sale, from which it appeared that the premises were sold on the 22d day of March, 1851, and that Charles Cole became the purchaser. Also, another affidavit of the attorney, showing the service of a copy of the original notice, and the several notices of postponement, upon the defendant, by mailing the same on the first day of February, 1851.

There was no proof of the service of any notice upon Adams, the mortgagor. The attorney testified that he made inquiries for him, and was informed by several persons in Stephentown that he had gone to Illinois, and had died there; that he thought he had inquired of George W. Glass and Dwight Platt, but was not positive that he had inquired of either. The counsel for the defendant objected to the proof of the death of Adams by hearsay, and also to the proof of such death in the manner the plaintiff

was seeking to prove it. The objection was overruled, and the defendant's counsel excepted. The testimony being closed, the court decided that the plaintiff was entitled to recover, and the defendant excepted. Judgment having been entered upon the decision, the defendant appealed to the general term

*M. I. Townsend*, for the plaintiff.

*J. H. Reynolds*, for the defendant.

*By the Court*, HARRIS, J. The original notice of sale was entirely ineffectual for any purpose connected with the foreclosure. It may be, that the republication of the notice with the several notices of postponement, for twelve weeks preceding the day of sale, would be a sufficient compliance with the requirement of the statute. I am inclined to think it would Disregarding all that had been done prior to the 24th of December, and regarding the notice, as it was then published, as the commencement of the proceedings, I think enough may be found in that notice, however awkward and unseemly it may appear, to meet the requirements of the statute. This notice, too, was affixed upon the outward door of the court house, and thus another requirement of the statute was met.

But, even if the notice as published on and after the 24th of December, and the affixing of a copy of this notice in the manner specified, were sufficient, there is still another ingredient in a valid statute foreclosure which is not to be found in these proceedings. There was no attempt to serve a copy of the notice upon the mortgagor. Without such service, in the manner prescribed by the legislature, if he was living, there could be no valid foreclosure. (*See Van Slyke* v. *Shelden*, 9 *Barb.* 278. *King* v. *Duntz*, 11 *Barb.* 191.) The plaintiff sought to obviate this objection by proving that the attorney who conducted the proceedings had made inquiries for the mortgagor, and had been informed that he was dead. If the death of the mortgagor had been proved, the objection to the validity of the proceedings would have been removed, unless it had further appeared that

he had personal representatives. But there was, in fact, no evidence at all of the death of the mortgagor. Even if it had been competent to prove such death by reputation, the inquiries and information of which the attorney speaks, furnish no evidence of such reputation. But, in this case, it was not competent to prove such death by hearsay. There were no circumstances to render such secondary evidence admissible. The death of the mortgagor, if the party alleging the validity of the proceedings would show an excuse for not serving him with notice, should have been proved by legal evidence of the fact, and not by mere hearsay or reputation. (*Fosgate* v. *Herkimer Man. & Hydraulic Co.* 12 *Barb.* 352.) If upon a new trial the plaintiff should be able to establish this fact, and there were no personal representatives of the mortgagor upon whom the notice could have been served, he may yet succeed in the action; but the judgment must be reversed and a new trial granted, with costs to abide the event.

[Albany General Term, September 4, 1854. *Wright*, *Harris* and *Watson*, Justices.]

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## Orr and others *vs.* Bigelow.

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The plaintiffs agreed with the defendant that they would subscribe for, and become responsible to take fifty shares of the capital stock of the Troy and Boston Rail Road Company, of the estimated value of $5000, and to pay $500 upon the subscription. They further agreed, after having paid the $500, to assign and transfer to the defendant, by a proper instrument of conveyance, all the said stock, &c. The defendant, in consideration thereof, agreed that after the plaintiffs should have paid the sum of $500, and upon their executing and delivering to him "an assigment or transfer of all said stock," he would execute and deliver to them a covenant to pay the remainder of the amount which would be due upon the subscription, and indemnify the plaintiffs and save them harmless against all claims, &c. arising in consequence of their liability incurred by becoming stockholders in the said company. The plaintiffs, in pursuance of this agreement, executed and tendered to the defendant an assignment of 50 shares of the capital stock of the rail road com

pany, which they had previously subscribed for, and on which they had paid $500, and also a power of attorney to transfer the stock on the books of the company. The by-laws of the company provided that no stock should be transferred on the books of the corporation until thirty per cent on each share had been paid in, unless by consent of the board of directors. The plaintiffs made application for such consent, and it was refused. The defendant declined accepting the assignment, on the ground that it was not a compliance with the terms of the agreement. The company sued the plaintiffs to recover the balance of their subscription, and obtained a judgment for $4690.85, which the plaintiffs paid. At the time the assignment of the stock was tendered, and at the time of the trial, the stock was worth from 40 to 43 cents on the dollar.

*Held* 1. That it was enough that the plaintiffs had executed an instrument which would transfer their interest in the stock to the defendant; it being no part of their agreement that they should procure a transfer of the stock upon the books of the company.

2. That the instrument executed by the plaintiffs would enable the defendant, if he desired it, to have the transfer made, upon the books of the corporation, upon complying with its by-laws. And that it was for him, and not the plaintiffs, to pay the residue of the 30 per cent required before a transfer upon the books could be obtained.

3. That having an instrument which would authorize him to procure such transfer to be made, upon making the requisite payment, it did not lie with the defendant to object that the transfer had not been actually made.

4. That the amount which the plaintiffs had been compelled to pay, upon the judgment against them, as the consequence of the defendant's breach of his agreement, was the proper measure of the plaintiffs' recovery for such breach.

APPEAL from a judgment rendered at the circuit. The action was tried at the Rensselaer circuit, in February, 1853, before Mr. Justice PARKER, without a jury. Upon the trial, the plaintiffs gave in evidence an agreement between them and the defendant, bearing date the 18th of May, 1849, whereby the plaintiffs agreed to subscribe for and become responsible to take, fifty shares of the capital stock of the Troy and Boston Rail Road Company, which would be of the estimated value of $5000, and for which they would, by their subscription, become responsible to pay that amount, and they agreed to pay $500 upon the subscription. They further agreed, after having paid the $500 upon their subscription, to assign and transfer to the defendant by a proper instrument of conveyance all the said stock, or the interest they should have acquired therein, and the defendant, in consideration thereof, agreed with

the plaintiffs, that he would, after they should have paid the sum of $500, and upon their executing and delivering to him an assignment or transfer of all said stock, execute and deliver, to the plaintiffs, a covenant to pay the remainder of the amount which would be due upon the subscription, as the same should become due and payable, and indemnify and save harmless the plaintiffs, of, from and against all claims and demands, actions and rights of action, arising from or made in consequence of their liability incurred by becoming stockholders in the said company.

The plaintiffs also proved that, on the 13th of August, 1850, they executed and tendered to the defendant an assigment of the fifty shares of the capital stock of the Troy and Boston Rail Road Company subscribed for by them in pursuance of the agreement of the 18th of May, 1849, subject to the calls thereon made and to be made, to the amount of $4500, and also a power of attorney to transfer the stock on the books of the company, pursuant to the by-laws of the company. It also appeared that, by the by-laws of the company, it was declared that no stock should be transferable on the books of the corporation until thirty per cent on each share had been paid in, unless by consent of the board of directors; and that the plaintiffs had made application for such consent and it had been refused. The defendant refused to accept the assignment when tendered to him, on the ground that it was not a compliance with the terms of the agreement.

The company, having sued the plaintiffs to recover the balance of the subscription, obtained a judgment against them, in June, 1851, for $4690.85, which judgment the plaintiffs paid. At the time the assignment of the stock was tendered by the plaintiffs to the defendant, and at the time of the trial, the stock was worth from 40 to 43 cents on the dollar.

The defendant insisted, upon the trial, 1. That the agreement of the 18th of May, 1849, contemplated, and that he had a right to exact, such a transfer of the stock as would invest the defendant with all the rights of the plaintiffs to control the stock and become a stockholder of the company; that the plain-

tiffs covenanted for such transfer, and the refusal of the directors to permit such transfer, was no excuse for the plaintiffs failing to perform their covenant; and that the assignment tendered did not invest the defendant with the rights of the plaintiffs as stockholders in the Troy and Boston Rail Road Company 2. That if the plaintiffs were entitled to recover at all, they were entitled to recover only the difference between the amount paid by them, with interest, and the value of the stock. The court decided that the plaintiffs were entitled to recover the amount of the judgment recovered against them, and the interest thereon, and that upon being paid such amount they should transfer the stock to the defendant. Judgment was perfected upon this decision, on the 18th of October, 1853, for $5617.59, and the defendant appealed to the general term.

*D. Buel, jun.* for the plaintiffs.

*A. B. Olin,* for the defendant.

*By the Court,* HARRIS, J. The plaintiffs agreed to subscribe for the stock in question and pay ten per cent thereon, and then to *assign and transfer it to the defendant by a proper instrument of conveyance.* The instrument tendered to the defendant on the 13th of August, was, in the language of the contract, a proper instrument of conveyance. Its effect was, to "assign and transfer to the defendant all the interest which the plaintiffs had acquired in the stock by their subscription and the payment of $500." This was all they had stipulated to do. It was no part of their engagement that they should procure a tranfer of the stock upon the books of the company. It was enough that they had executed an instrument which would transfer their interest to the defendant. That instrument would enable the defendant, if he desired it, to have the transfer made upon the books of the corporation, upon complying with its by-laws. It was for him, and not the plaintiffs, to pay the residue of the 30 per cent required before a transfer upon the books could be obtained. Having an instrument

which would authorize him to procure such transfer to be made, upon making the requisite payment, it does not lie with him to object that the transfer had not been actually made.

I think, too, that the proper measure of damages was adopted at the circuit. The plaintiffs had subscribed for the stock under their agreement with the defendant. They had paid the ten per cent they had stipulated to pay, and had executed a sufficient assignment of the stock and tendered it to the defendant. The defendant had refused to accept the assignment, without sufficient cause. This tender and refusal must be regarded as equivalent to a performance, on the part of the plaintiffs, of their agreement to assign the stock. It then became the duty of the defendant, the plaintiffs having done all that was required of them, to pay the remaining ninety per cent upon the stock and to protect the plaintiffs against further liability. His omission to discharge this duty has subjected the plaintiffs to the payment of the judgment recovered against them for the balance of the subscription price of the stock. The amount which they have thus been compelled to pay, as the consequence of the defendant's breach of his agreement, constitutes the proper measure of the plaintiffs' recovery for such breach.

The situation of the defendant is not very unlike that of one who, having employed a mechanic to construct an article, afterwards refuses to accept it. The tender of the article and the refusal to accept, in reference to an action by the mechanic for the price of the article, are equivalent to a delivery, and the mechanic, though he still have the property in his hands, may recover of his employer the full price. (*Bement* v. *Smith*, 15 *Wend.* 493. *Sedg. on Dam.* 282.) The plaintiffs had by their subscription and the payment of $500, brought the stock into existence. They had done this, too, upon the employment of the defendant. The defendant was bound to accept it, when tendered, and to pay for it according to the terms of the contract. The proper assignment was tendered and refused. This furnished a sufficient foundation for an action to recover the contract price, which was ninety per cent, payable as the same should become due and payable to the company. The plaintiffs

were under no obligation either to sell the stock and credit the defendant with the proceeds, or to become the purchasers of it themselves. They held it for the defendant, and their only duty in respect to it was, to assign it to him upon request.

The provision in the judgment that upon the payment or collection of the amount recovered by the plaintiffs they should transfer the stock to the defendant, may be useless, but it is also harmless. It merely declares what would have been the duty of the plaintiffs without any such direction. At any rate, being a provision for the benefit of the defendant, it is not for him to complain. He is not obliged to enforce it. The judgment should therefore be affirmed.

[Albany General Term, December 4, 1854. *Wright*, *Harris* and *Watson* Justices.]

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## Groat *vs.* Rees.

Before a chattel mortgage can be upheld as a valid security, where there has been no actual and continued change of possession, the party asserting its validity must establish, affirmatively, two propositions; first, that the transaction was *bona fide*; and, secondly, that there was no intention to defraud creditors or purchasers.

It is not enough to show that the mortgage was given for a good and valid consideration. It is equally necessary to prove the absence of a fraudulent intent

But, where it is admitted that the mortgage was given for a good and valid consideration, it is proper to submit the question to the jury whether it was no also executed without any intent to hinder or delay creditors.

And if there is no evidence that the mortgagor was indebted to any other persor than the mortgagee, and there is nothing in the case to show that the mortgage was executed for any other purpose than to secure a *bona fide* debt, the jury will be justified in finding in favor of the validity of the mortgage.

APPEAL from a judgment of the Schenectady county court The action was brought before a justice of the peace. The plaintiff claimed to recover the value of a horse, which had

been wrongfully taken from him by the defendant. On the trial it appeared that the horse had been owned by one Sitterly, who had, on the 9th of August, 1852, mortgaged him to the plaintiff to secure forty dollars, with interest, payable in thirty days, and that the mortgage had been filed in the proper office. Sitterly retained the possession of the horse until some time in the winter or spring after the execution of the mortgage, when he sold him, and, after passing through the hands of several owners, he came into the possession of the defendant. It was admitted that the mortgage was given for a good and valid consideration. The justice rendered a judgment for the plaintiff for $18.88 damages and costs. From this judgment the defendant appealed to the county court, and that court reversed the judgment. The plaintiff appealed to this court.

*Thomas Smith*, for the plaintiff.

*C. B. Cochrane*, for the defendant.

*By the Court*, HARRIS, J. The plaintiff claimed the horse in question as mortgagee. The defendant claimed title as a subsequent purchaser in good faith. Upon the execution of the mortgage, there was no change of possession. The mortgagor continued in possession of the horse until it was sold. Upon this state of facts the law declared the mortgage void as against the defendant, unless upon the trial the plaintiff could make it appear "that the mortgage was made in good faith, and without any intent to defraud the creditors of the mortgagor or subsequent purchasers in good faith." (2 *R. S.* 136, § 5.) Before the mortgage could be upheld as a valid security, the plaintiff was required to establish, affirmatively, two propositions: first, that the transaction between the parties to the mortgage was *bona fide*, and then, that there was no intention to defraud creditors or purchasers. It was not enough to show that the mortgage was given for "a good and valid consideration." It was equally necessary to prove the absence of a fraudulent intent. It has been well said, that these are distinct and independent

facts, and that the proof of the one in no degree alters or lessens the obligation of proving the other. (*Randall* v. *Parker*, 3 *Sandf. S. C. R.* 69.)

But while it is necessary to prove both facts, in order to uphold the mortgage, the same evidence which establishes the one may also be pertinent with reference to the other. I cannot say that in this case the admitted fact that the mortgage was executed upon a good and valid consideration did not tend to prove the absence of a fraudulent intent. I think it did. I should not feel at liberty to withhold such testimony from the consideration of a jury.

I am aware that in *Randall* v. *Parker*, above cited, where Mr. Justice Duer has discussed the subject with admirable ability and clearness, the opinion is expressed that even where the evidence is sufficient to show good faith in the transaction, the court might direct a verdict for want of evidence to rebut the presumption of fraudulent intent. The question was not before the court for judgment, and I am persuaded that, upon consideration, the position would not be insisted on, even by that enlightened judge himself. Though the statute requires the party who asserts the validity of a sale or mortgage unaccompanied by a change of possession, to prove both the good faith of the transaction and the absence of any fraudulent intent, yet it is not quite easy to conceive of a case where there has been entire good faith between the parties, which is, nevertheless, tainted with fraud. At the least, the evidence of good faith furnishes some proof to be submitted to a jury, upon the question of fraudulent intent. In some cases, as where a mortgage is executed to secure a loan of money made at the time, and where the transaction is unattended with any circumstances of suspicion, the same evidence which proves good faith might also be satisfactory upon the question of fraudulent intent. In the case under consideration, when the plaintiff proposed to give evidence to show the consideration of the mortgage, the defendant waived the necessity of such evidence by admitting that the mortgage was given for a good and valid consideration. In effect, it was admitted that the mortgage was given in good

faith. Can it be said that such an admission has no bearing upon the question of fraudulent intent? or, rather, was not the jury who tried the case before the justice, justified in finding, from this very fact, that the mortgage was also executed without any intent to hinder or delay creditors? There was no evidence that the mortgagor was indebted to any other person than the plaintiff. There is nothing in the case to show that the mortgage was executed for any other purpose than to secure a *bona fide* debt. Under these circumstances, I am of opinion, not only that the question was properly submitted to the jury, but that the verdict is sustained by the evidence. The judgment of the county court should, therefore, be reversed, and that of the justice affirmed.

[Albany General Term, December 4, 1854. *Wright, Harris* and *Watson*, Justices.]

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Outwater, plaintiff in error, *vs.* Nelson, defendant in error

In an action upon a memorandum acknowledging the receipt of a quantity of corn in store, "on freight," the defendant offered to prove that it was the custom, at the landing where the corn was delivered, and had been for forty years, to pay for grain left on freight after the owner had ordered it to be freighted, and not before; and that this custom was known to the plaintiff, and that he himself had been in the habit, for many years, of leaving grain at that place, to be freighted, upon the same terms. *Held* that the evidence should have been received; and for its rejection the judgment was reversed.

*Held also*, that the plaintiff could not recover, upon such memorandum, without proving that the defendant had shipped the corn, or that he had been called upon for payment.

ERROR to the Dutchess common pleas. The action was commenced before a justice of the peace, in April, 1843. The plaintiff claimed to recover upon two receipts, one of which was as follows: "February 22, 1839. Received in store, Red Hook Landing, of Samuel Nelson, by self, $50\frac{2}{3}\frac{7}{2}$ bus. corn on freight

James Outwater." The other receipt was in the same terms, and was for $27\frac{6}{56}$ bushels corn. The declaration alleged that in consideration that the plaintiff, Nelson, had sent and consigned to the defendant, Outwater, corn, &c. the defendant undertook and promised the plaintiff to sell the same and render a true account of the sales within a reasonable time; that the defendant received and had sold the grain and had not paid for it. The defense was that the corn was consigned to the defendant as a freighter, to dispose of when the plaintiff should direct and order, and that the plaintiff never ordered the grain sold. Upon the trial before the justice, the plaintiff recovered a judgment for $45.74 besides costs. The defendant appealed to the common pleas. Upon the trial in that court, the defendant offered to prove that it was the custom, at the landing of the defendant, and had been for forty years, and was known to the plaintiff, not to call for pay for grain left on freight until it is ordered to be freighted; and that it was and had been the custom, and known to the plaintiff, not to pay for grain until it had been ordered to be freighted. The evidence was objected to, and excluded. The defendant's counsel excepted.

The counsel for the defendant also offered to prove that the plaintiff had for many years been in the habit of leaving corn on freight at the defendant's landing and receiving pay for it after he had ordered it freighted, and not before. This evidence was also objected to, and excluded, and the defendant's counsel excepted.

The testimony being closed, the court charged the jury that the evidence was sufficient to entitle the plaintiff to recover. The counsel for the defendant excepted to the charge. Various other questions were raised by the bill of exceptions, but as they are not noticed in the opinion of the court, it is unnecessary to state them here. The jury rendered a verdict for the plaintiff, for $36.75, for which amount, with costs, judgment was perfected in February, 1844, and the defendant brought error to this court.

*W Eno*, for the plaintiff in error.

*H. Hogeboom*, for the defendant in error.

*By the Court*, HARRIS, J. Every contract may reasonably be presumed to be made with reference to the existing state of things. Hence it is said, that "the usage or habit of trade or the conduct of an individual, which is known to the person who deals with him, may be given in evidence, to prove what was the contract between them." (2 *Greenl. Ev.* § 251.) It appears from the receipts given in evidence that the corn delivered by Nelson to Outwater was not sold, but was delivered "on freight." What did the parties intend by this? It has already been held, in reference to these very words, that evidence may be given to explain their meaning. (*Dawson* v. *Kittle*, 4 *Hill*, 107.) It is obvious that the party receiving the corn did not become the absolute purchaser. What then was the relation in which he stood to the owner? When and how was he to become liable to pay for the corn? The defendant in the court below offered evidence to explain this. He offered to show that for forty years it had been the practice at the landing where this corn was delivered, to pay for grain left on freight after the owner had ordered it to be freighted, and not before; and that this practice was known to the plaintiff. He went further, and offered to show that the plaintiff himself had been in the habit for many years of leaving grain at the same place to be freighted, upon the same terms. If these facts had been proved, no one could have hesitated to say that when the parties used the words "on freight," in their contract, they both understood that it was left to be disposed of according to the usage of the place and of the parties themselves. Such a custom as that contained in the offer is convenient and reasonable. It enables the producer to select his own time to dispose of his grain, and thus secure the chance of an increased price; while the freighter may also, by freighting and selling before he is ordered, avail himself of the chance of a reduced price.

The court also erred in charging the jury that the evidence

was sufficient to entitle the plaintiff to recover. It was, in effect, directing a verdict for the plaintiff. It could not be pretended that the defendant was liable, unless he had shipped the corn, nor unless he had been called upon for payment. These, at least, were questions of fact which should have been submitted to the jury, even as the law was viewed by the court below. Other questions arose upon the trial, upon some of which I am inclined to think the court erred. But, for the errors already noticed, the judgment must be reversed and a *venire de novo* awarded to the Dutchess county court; with costs to abide the event.

[Albany General Term, December 4, 1854. *Parker*, *Wright* and *Harris*, Justices.]

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## Etz *vs.* Daily.

Where an owner of land conveys the same to another, excepting the portions included in the highway, he may maintain an action of ejectment against the grantee, for encroachments upon the highway, or for an exclusive occupation of it, by the latter.

APPEAL by the plaintiff, from a judgment entered upon the report of a referee. The action was ejectment, brought for the recovery of two pieces of land lying in Preble, Cortland county. On the trial before the referee it appeared in evidence that on the 11th day of April, 1829, William Etz and Elizabeth his wife conveyed, by deed with warranty in fee, to Christian Etz (the plaintiff) and John Etz, a farm in Preble, which included the premises in question. On the 23d day of April, John Etz and his wife conveyed the same premises to the plaintiff; both of said deeds being properly acknowledged, but not recorded. On the 23d of January, 1838, Christian Etz and wife conveyed the same premises to the defendant, "excepting and reserving therefrom all of the land included in the above boundaries which is embraced in the highways," for which land, in-

cluded in the highways, this action was brought. From these facts the referee found as matter of law, that the plaintiff had a title in fee to the premises in question. He further found that since the defendant purchased the farm, he had constructed side-walks and planted shade trees along the side of the road adjoining his premises; that he had also on several occasions unloaded wood and lumber, and thrown the manure from his stables into the road adjoining his premises; that he had also on different occasions, and until within a short time prior to the commencement of this suit, claimed to own said road, and denied the plaintiff's title thereto. That the premises claimed were a public highway in the town of Preble, and had been used as such for a long period, and over forty years, and were still an open and traveled road. That the said road was so used when the defendant purchased of the plaintiff; and that the defendant had at no time moved his fences into or upon said road beyond where they were located by the plaintiff.

The referee found, as matter of law, that the plaintiff was not entitled to recover possession of the premises claimed, or any part thereof; and he directed judgment to be entered for the defendant, with costs.

*P. McDonald*, for the appellant.

*Sedgwick & Outwater*, for the respondent.

*By the Court*, GRAY, J. The facts in this case are, in short, these: The plaintiff conveyed to the defendant his farm in Preble, Cortland county, excepting therefrom the land embraced in its boundaries which at the date of the deed was included in the highway. Since the conveyance the defendant has dug up the road and run a water pipe across it; set out fruit and shade trees, and piled stone, lumber and manure within its boundaries, and used a portion of it for farming purposes, and claims, as against the plaintiff, the right to appropriate the highway to the uses described. The simple and only question presented is, whether ejectment can be maintained by the plain-

tiff for the recovery from the defendant of the premises thus used and occupied by him. That the freehold of the land in question is in the plaintiff, no one denies; but whether ejectment can be maintained by the owner of the freehold, while the highway exists, is a question upon which there is a diversity of opinion among judges. *Goodtitle* v. *Acker*, (1 *Bur.* 133, 145,) and 3 *Kent's Com.* 433, are authorities in favor of the right to maintain the action. And although the precise question here presented, has not been adjudged, in this state, it has been judicially asserted in several cases; by Platt, J., in *Jackson* v. *Hathaway*, (15 *John.* 453;) by Savage, Ch. J., in *Saunders* v. *Wilson*, (15 *Wend.* 339;) by Cowen, J., in *Pearsall* v. *Post*, (20 *id.* 126;) by Gridley, J., in *Burdick* v. *Goit*, (3 *Barb. S. C. R.* 468;) and by Hand, J., in the case of the *Northern Turnpike Company* v. *Smith*, (15 *id.* 355.) The only opinion against this doctrine, emanating from the bench in this state, is to be found in *Adams* v. *The Saratoga and Wash. R. R. Co.* (11 *Barb.* 414, 453–5.) The learned judge in that case follows the opinion of a distinguished judge in the case of *The City of Cincinnati* v. *The Lessee of White*, (6 *Peters' U. S. R.* 431, 441–2.) It is worthy of remark, that in each of these cases the opinions, although elaborate, were extra judicial. The only question in the case last referred to was, whether the land sought to be recovered had been dedicated to public use. The same question arose in the case of *Adams* v. *The Saratoga and Wash. R. R. Co.*, and there the question was whether it had been used for purposes other than that for which it was dedicated. There had been no appropriation, in either case, to private use, and hence the point here made was not up, and so one of the learned members of the court, upon being referred to the case, has since decided. (*Northern Turnpike Co.* v. *Smith*, 15 *Barb.* 355, 358.) Thus it will be seen that these opinions are of no greater weight, as authority, than those holding to the contrary doctrine, before referred to, and that in reality nothing has been decided in this state that tends in the slightest degree to impair the influence of opinions emanating from the highest legal intelligence, in favor of the right to

maintain this suit. The cases referred to in *Smith's Leading Cases*, 183, 184, show that wherever the question has arisen, except in Connecticut, the right to maintain ejectment has been established. The only objection ever urged against it is, that exclusive possession of the premises in dispute cannot be given to the plaintiff. But let this objection prevail and any erection short of a nuisance may be made on the road side in front of the owner's domicil, and the owner would be without complete redress, and the lawless occupant would hold it until the use of the whole road as a highway should be discontinued, unless the public authorities should see fit to remove him. This objection, it seems to me, is completely disposed of by Lord Mansfield, who held that the sheriff should deliver the possession of the defendant to the plaintiff, subject to the public easement. The conclusion to which I have arrived is, that the judgment entered on the report of the referee should be reversed, and a new trial ordered.

Judgment accordingly.

[Madison General Term, September 12, 1854. *Gray*, *Mason* and *Shankland*, Justices.]

## Gillespie *vs.* Rosekrants.

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The 110th section of the code which requires that a promise, to take a case out of the operation of the statute of limitations, shall be in writing, is not applicable to cases where the right of action had accrued before the adoption of the code.

Appeal from a judgment of the Ulster county court. The action was brought before a justice of the peace. The plaintiff claimed to recover upon a promissory note for $31.52, dated July 1, 1845, made by the defendant and payable to the plaintiff, *on demand*. The action was commenced on the 23d of July, 1851. The defendant, by his answer, insisted that the note was barred by the statute of limitations. Upon the trial

the plaintiff proved that, on the 13th of June, 1851, an agent who held the note for collection, called on the defendant to obtain payment, or a new note, and that the defendant then promised that he would pay one half of the note and the interest thereon on the 20th of June, and arrange the other half by giving a new note, or in some other way. The justice rendered judgment in favor of the plaintiff for $44.94, the amount of the note and interest, and $2.78 costs, which judgment was reversed by the county court upon appeal. The plaintiff appealed to this court.

*L. Tremain*, for the plaintiff.

*E. Cooke*, for the defendant.

*By the Court*, HARRIS J. The plaintiff's cause of action was undoubtedly barred unless the promise made by the defendant on the 13th of June, was sufficient to take it out of the statute. It is not denied that such would be the effect of that promise, were it not for the 110th section of the code, which requires that a promise, to take a case out of the operation of the statute of limitations, must be "contained in some writing signed by the party to be charged thereby." The court below held that this provision of the code was applicable to the case, and, upon that ground, reversed the judgment of the justice. In making this decision, it is obvious that the provision in the 73d section, which declares that the title of the code in which the 110th section is found, shall not extend to cases where the right of action had already accrued, was overlooked. It is expressly provided in that section, that the statutes in force at the time the code was adopted, shall be applicable to such cases. This was such a case. The note having been made in July, 1845, and being payable on demand, a right of action had accrued, and was existing at the time the code took effect as a law. The provisions of the code, therefore, did not affect the case.

The case of *Wadsworth* v. *Thomas*, (7 *Barb.* 445,) has no application to the question under consideration. That case arose

under the code of 1848. The 90th section of that act, which is the 110th section of the present code, merely provided that in cases where the time for commencing an action arising on contract should have expired, the cause of action should not be deemed to have been revived by an ackowledgment or new promise unless the same should be in writing &c. The provision had no reference to a case where the promise relied upon to take the case out of the statute of limitations had been made before the debt had become barred. But the 110th section, as amended in 1849, was made applicable to every case of acknowledgment or new promise, except in cases where a right of action was in existence at the time the code took effect as a law. The case in hand is within that exception. The decision of the county court was, therefore, erroneous, and should be reversed, and the judgment of the justice affirmed.

[Albany General Term, May 7, 1855. *Parker, Wright* and *Harris*, Justices.]

## Milliman *vs.* Neher.

A chattel mortgage can only operate upon property in actual existence at the time of its execution. It cannot be given on the future products of land.

Thus where a lease was executed, in March, 1852, between the plaintiff and M., of a farm, for one year from the 1st of April then next, at a specified rent, and it was stipulated that the plaintiff should have a "lien upon the crops, as security for said rent," and that M. should "market the same;" *Held* that a person who had purchased from M. corn, raised upon the farm, with knowledge of the plaintiff's claim to a lien thereon, could hold the same, as against the plaintiff.

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|---|---|
| 20 | 37 |
| 34 | 15 |
| 41 | 407 |
| 41 | 612 |
| 62 | 323 |
| 17h | 122 |
| 27h | 92 |
| 42k | 623 |
| 65a | 467 |
| 82a | 376 |
| 118a | 136 |

THIS action was commenced before a justice of the peace, to recover the value of a quantity of corn. On the trial the plaintiff read in evidence a lease dated March 25, 1852, executed by the plaintiff and one William Montgomery, by which lease the plaintiff leased to Montgomery a farm, for one year from April 1st then next, at an annual rent of $325. The last clause

of the lease was as follows: "*And said Milliman shal. have the lien upon the crops as security for said rent, said Montgomery to market the same.*"

The plaintiff then proved that in the fall or winter of 1852, Montgomery sold to the defendant about 164 bushels of corn in the ear, for which the defendant gave his promissory note, and that the defendant knew of the plaintiff's claim, when he made the purchase. Other facts were proved on the trial, but none having any important bearing upon the questions considered in the case.

The justice gave judgment for the plaintiff, which the county court reversed; whereupon an appeal was taken to this court.

*C. R. Ingalls*, for the appellant.

*J. W. Crane* and *H. W. Merrill*, for the respondent.

*By the Court*, Bockes, J. The lease purports to have been executed and delivered on the 24th of March, and the term was to commence on the 1st day of April following. When the supposed lien was created, therefore, Montgomery had only a lease of the farm *in presenti*, to commence on a future day. The crops then had no existence, nor was it certain that they ever would exist. In *Barnard* v. *Eaton*, (2 *Cush.* 295,) it was decided that a mortgage could not apply to goods not in existence, or not capable of being identified at the time of its execution; and Justice Shaw, in giving the opinion of the court remarked, that the mortgage was an executed contract; a present transfer of title, although conditional and defeasible: it could therefore only bind and affect property existing and capable of being identified at the time it was made. See also *Jones* v. *Richardson*, (10 *Met.* 481;) *Winslow* v. *Merchants' Ins. Co.*, (4 *id.* 307;) *Codman* v. *Freeman*, (3 *Cush.* 306.) In the *Bank of Lansingburgh* v. *Crary*, (1 *Barb. S. C. R.* 542, 551,) Justice Paige intimates the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution, and cannot be given on the future products of real estate. The same learned

judge afterwards considered the question in *Otis* v. *Sill*, (8 *Barb.* 102;) and it was there held that a grant or mortgage of property not then in existence was void in law.

The case of *Munsell* v. *Carew*, (2 *Cush.* 50,) is directly in point. Munsell leased the half of his farm to Buckland, for a year, at the rent of $60, and it was provided in the lease that in case of refusal or neglect to pay the rent Munsell was to have all the crops which might or should grow on the farm, to dispose of as he should see fit. Carew, well knowing the contents of the lease, took title to some of the crops from Buckland, and refused to deliver the same to Munsell, on demand. In an action of trover by Munsell against Carew, it was held that until delivery of the crops to Munsell, or until possession thereof was taken by him, they remained the property of Buckland, and might be sold by him or attached by creditors.

We are referred to *Shuart* v. *Taylor*, (7 *How. Pr. R.* 251,) as a case favorable to the plaintiff's recovery. In that case one Cogswell executed a mortgage to Clark of his right, title and interest in and to about thirty acres of fallow or wheat. His interest was the use of the fallow then in his possession, with the right to sow it to wheat, on shares; and part of the fallow was then sowed. Justice Strong held that the mortgage was operative on the property described in it, and remarked that "as the mortgage was upon the interest of Cogswell in the *fallow*, I am of the opinion it bound his right to the use of the land, and the wheat which was raised in the exercise of that right." And he further stated that "this was not the case of a mortgage of property which the mortgagor did not own at the time, but one of a mortgage upon an interest in property which then belonged to the mortgagor."

It cannot be pretended, in the case under consideration, that Montgomery mortgaged, or intended to mortgage, "his right to the use of the land;" hence, the wide difference between this case and the one cited. Trees, grass, and corn growing and standing upon the ground, fruit upon trees, and wool upon the sheep's back, may be mortgaged. (*Shep. Touch.* 241, *title Grant.*) So also, a man may grant all the wool of his sheep

for seven years, but this grant is upheld on the ground that the wool is deemed to be continually growing; hence the grantor has at the time, if not an actual, a potential ownership and possession of the property granted. There are cases in which sales and conveyances of future freight or earnings of ships, and of grants of estates in expectancy, have been sustained; but those were cases in equity. This is an action at law; and the plaintiff's right to recover depends upon his ability to show a legal title to the corn. To support his action the clause in the lease must amount to a sale, a mortgage or a pledge of the crops. They were not pledged, because they were never delivered. Delivery is essential to constitute a pledge. (*Brownell* v. *Hawkins*, 4 *Barb.* 491.) A mortgage of goods is in some cases valid without delivery, but not so a pledge. (*Per Kent, J.*, *Cortelyou* v. *Lansing*, 2 *Caines' Cas.* 200. *Wilson* v. *Little*, 2 *Coms.* 443. *Story on Bailment*, § 287.)

There was no sale or mortgage of the crops, for the reason that they had no existence when the instrument was executed and delivered. Besides, I am of the opinion that the terms used, that the plaintiff should have a "*lien on the crops as security*," do not import a sale or mortgage. A mortgage is a conditional sale. This clause of the lease contains no words of sale, nor any from which a sale can be implied. (*Brownell* v. *Hawkins*, 4 *Barb.* 491.)

But there is still another view of the case, conclusive against the plaintiff's right of recovery.

Montgomery was "*to market*" the crops. The phrase *to market*, has a definite and well understood signification, and means *to sell*. Montgomery, therefore, had authority to sell the corn; and whether in his own right as principal and absolute owner, or as agent for the plaintiff, can make no difference. It was insisted, on the argument, that the authority to market the crops should be construed to mean, to sell the same subject to the plaintiff's lien; but that would be in effect to strike out of the lease the words conferring the power. Montgomery would have had the right to sell the crops subject to the plaintiff's lien, without any authority from him whatever. The par

ties contracted for themselves, and no term, qualification or condition can be erased, or superadded, by the court.

It is insisted that this construction will totally defeat the lien. Better so than that a purchaser under the plaintiff's written authority should be compelled to pay twice for the same property. He cannot be permitted to invalidate a sale which he in plain terms authorized. But it does not follow that the plaintiff's rights under that clause of the lease are destroyed by this construction. He may have been entitled to relief in equity. As between the parties to the instrument, and in regard to the note given on the sale of the corn, certain rights would remain. If the clause in the lease giving the supposed lien had any legal efficacy, the plaintiff might have reached the note, in the hands of Montgomery. But this is not the place to discuss the plaintiff's extraordinary and equitable rights. In this action the examination must be confined to questions in regard to the legal title to the property in controversy. (*Otis* v. *Sill*, *supra*, 121.)

The cases are numerous in which the doctrine is held, that as between mortgagees and good faith purchasers or creditors of the mortgagor, an instrument which should allow the mortgagor to deal with the mortgaged property as his own would be void. (*Griswold* v. *Sheldon*, 4 *Coms.* 581, *and cases there cited in opinion of Brown, J.*) When the instrument creating the lien also confers on the mortgagor a right or power to sell the property mortgaged, the buyer should be protected as a purchaser in good faith. He is presumed to have purchased under the authority conferred by the instrument. (*Benson* v. *Bolles*, 8 *Wend.* 175.) Such an instrument would create no lien on the property, as against a purchaser or creditor.

The judgment of the county court must be affirmed.

[SCHENECTADY GENERAL TERM, May 7, 1855. *Bockes*, *C. L. Allen* and *James*, Justices.]

20 42
36 29
42 16
33 448
48 631
1h 553
56h 483
73a 495

## CLARK & WOOD *vs.* DALES & DALES.

On the 30th of August, 1853, the defendants proposed to the plaintiffs, by letter, as follows: "We will engage to furnish you a boat load of flour, the last of next week, same quality sent G. and M., at $4.7-6, free to boat." This proposition was immediately answered by the plaintiffs in these words: "We will take the boat load flour, as per your proposition in yours of the 30th inst." *Held* that this was a clear and unqualified acceptance, by the plaintiffs, of the defendants' proposal, and that as soon as the plaintiffs' letter had gone beyond their control the bargain was complete, and it became mutually obligatory upon the parties, and could not be rescinded by either, without the consent of the other.

The letter of acceptance contained this inquiry: "Please say to us how we shall remit?" *Held* that this inquiry did not qualify the acceptance of the defendants' proposition.

*Held also*, that it was competent for the parties, by a subsequent parol contract, to extend the time for the performance of the original agreement; and this without any new consideration.

And the plaintiffs being ready at the place of delivery, on the day to which the contract was extended, and willing to perform on their part, and the defendants refusing to deliver the flour; *it was held, further*, that the true measure of damages was the difference between the contract price and the value of the flour agreed to be delivered, on that day, with interest.

When one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment by the purchaser, of a readiness and willingness to receive and pay *at that place*, in case he sues for a non-delivery, is indispensably necessary to a good complaint.

But the omission to make this averment is a defect which is cured by a verdict.

On appeal, in such a case, from the judgment rendered at the circuit, the fact omitted to be averred in the complaint, will be presumed to have been proved; inasmuch as a readiness and willingness to perform could not be proved, so as to authorize a verdict for the plaintiffs, without also proving a readiness and willingness to do so *at the place*.

This is not such a case of *variance* between the complaint and the facts found or proved as will be deemed to affect the substantial rights of the parties.

Yet an *amendment* of the complaint is admissible and appropriate, under such circumstances, for the purpose of securing certainty and harmony in the record; and is sanctioned by § 173 of the code.

The amendment may be ordered at a general term, and without formal notice of motion for that purpose, when the object of the amendment is only to conform the complaint to the facts found, and when the record furnishes the only grounds for and against the same.

THIS was an appeal by the defendants from a judgment entered at a special term of the court. The first count of the

complaint alleged a contract between the parties, made on the 30th day of August, 1853, for the sale and delivery by the defendants to the plaintiffs of a boat load of flour, at the plaintiffs' boat at the village of Jordan, for $4.93¾ per barrel, to be delivered during the week next following the time of making the contract. The plaintiffs alleged that they had been always ready and willing to receive and pay for the flour, but that the defendants had wholly omitted to perform on their part. The second count was in substance the same as the first, except that it alleged that the time of delivery, mentioned in the first contract, was extended one week, by the agreement of the parties. The third count was the same, except that it alleged that the flour was to be delivered in a reasonable time. The fourth count was in the like form, except that it alleged the flour was to be delivered by the 1st day of October, 1853. The fifth count was the same, except that the time of delivery was alleged to have been on the 2d day of Oct. 1853. The answer denied all the allegations in the complaint. The cause was tried at the circuit in Montgomery county, in February, 1854, before the Hon. C. L. ALLEN, J., without a jury. The justice found the following facts:

That on the 31st day of August, 1853, the defendants, who were partners and millers doing business at Jordan, in the county of Onondaga, agreed in writing, with the plaintiffs, who were partners and merchants doing business at Fort Plain, in the county of Montgomery, to sell and deliver at or to their boat at Jordan, 800 barrels of flour, upon the following terms: That the flour should be of the quality of the flour previous to that time sent by the defendants to Gilchrist & Mozer, should be delivered the last of the then next week, free of expenses, to the plaintiffs, to their boat at Jordan, in the Erie canal, and that the plaintiffs should pay the defendants for said flour at the rate of $4.91 per barrel; in consideration of which the said plaintiffs at the same time agreed with the said defendants in writing, and promised the defendants to accept and receive the said flour at the time and place before mentioned, and to pay for it at the rate of $4.94 per barrel; and the defendants

agreed with the plaintiffs at the same time to procure to be delivered the said flour at the time and place and in the manner aforesaid; that the time for the delivery of the said flour was by the agreement of the parties in writing, on or about the 3d of September, extended for a reasonable time, until the 1st of October, 1853, at which day the delivery of the flour at the plaintiffs' boat at Jordan, (which boat was then lying in the Erie canal at Jordan, ready for the reception of said flour,) was demanded of the defendants by the plaintiffs, and the whole amount of the purchase money, at the price agreed upon, tendered and offered to the defendants, at Jordan aforesaid; that the defendants then and there refused to accept and receive the said money, and refused and neglected to deliver the said 800 barrels of flour, or any part thereof, to the plaintiffs at their boat, pursuant to the said contract; that the plaintiffs were at all times ready and willing to accept and receive and pay for the flour at their boat at Jordan, as required by the contract; that the time for the delivery of the flour was from time to time extended at the sole request of the defendants, in writing, by the plaintiffs' consent, until the 1st of October, 1853. And the judge further found that the market value of flour of the description mentioned in the contract, which was denominated Skaneateles Lake Mill brand, was, on the 1st day of October, 1853, at Jordan, $6.50 per barrel; and he adjudged and determined as matters of law, from the above facts, 1st. That the flour was to be paid for at the rate mentioned in the contract, in cash, on the delivery at the plaintiffs' boat, at Jordan. 2d. That the plaintiffs were entitled to recover against the defendants damages for the breach of contract on their part, in neglecting and refusing to deliver the flour when demanded, on the 1st day of October, 1853. 3d. That the amount of damages the plaintiffs were entitled to recover against the defendants was the sum of twelve hundred and forty-eight dollars.

The defendants' counsel moved for a nonsuit, or dismissal of the complaint, on the following grounds: 1. That no contract for the sale and delivery of the flour had been proved, as the time and manner of payment had not been agreed upon by the parties

2. That the complaint did not contain a statement of sufficient facts to constitute a cause of action. 3. That the plaintiffs were not entitled to recover under the first count in the complaint, for the following reasons: (1.) That it did not contain a statement of sufficient facts to constitute a cause of action; (2.) That the contract, or cause of action, if any was set up, was not proved; (3.) That the performance or readiness to perform, on the part of the plaintiffs, was not proved; (4.) That no final agreement between the parties was proved; (5.) That the plaintiffs were not entitled to recover on either of the remaining counts, for the same reasons; (6.) That the proof failed to show a cause of action. His honor the judge denied the motion, and the counsel for the defendants excepted. The defendants also excepted to the finding of the justice as to the facts.

Judgment was entered in favor of the plaintiffs for $1352.73.

*Porter & Raynor*, for the appellants. I. The complaint does not state facts sufficient to constitute a cause of action. It alleges that the defendants were to deliver the flour to the plaintiffs at their boat in Jordan. A readiness and willingness to pay the defendants at the plaintiffs' boat should have been alleged. (*Coonley* v. *Anderson*, 1 *Hill*, 519. *Porter* v. *Rose*, 12 *John.* 209. 4 *Term R.* 125. 1 *East*, 203. 2 *Bos. & Pul.* 447. 1 *id.* 320 *and n.* 4. 5 *John.* 179. 2 *id.* 207. 2 *Saund.* 252, *n.* 3. *Mont. Co. Bank* v. *Albany City Bank*, 3 *Seld.* 464.)

II. The proof entirely fails to sustain either count in the complaint. The first count alleges that the flour was to be delivered the last of the week next following the time of the making of the contract, which would be on Saturday the 10th of September. It cannot be pretended that the proof shows a readiness on the part of the plaintiffs at Jordan to receive and pay for the flour at that time. An excuse for not being so ready and willing is not set up in the complaint, and will not therefore aid the count in that respect. (*Crandall* v. *Clarke*, 7 *Barb.* 169. 1 *Chit. Pl.* 320, 321, 326. *Baldwin* v. *Munn*, 2 *Wend.* 399.) The 2d count sets forth the same contract contained in the first, and alleges that by an agreement between the parties

the time for the delivery of the flour was extended one week. It also alleges a readiness and willingness on the part of the plaintiffs to perform. It will be seen that there is no proof of the extension set forth in this count, and consequently no proof of a readiness and willingness on the part of the plaintiffs to perform on their part. The 3d count sets forth an original contract to sell and deliver within a reasonable time, &c. There is no proof tending to sustain this count. The 4th count sets forth an original contract to sell and deliver &c., on the first day of October, 1853. There is no proof tending to show such a contract. The 5th count sets forth an original contract, in substance the same as that set forth in the 4th count. To sustain an action under either of the four last counts there should be proof not only of the agreements therein set forth, but that the agreements were in writing. The letter of the plaintiffs of Sept. 5, in answer to the defendants' letter, in which they state their inability to deliver the flour as soon as was expected, so far from agreeing to any extension of time, does not even give the defendants permission to delay, and contains nothing which would forbid them from demanding a delivery of the flour on the 10th. That letter requests the defendants by return mail to fix a day when they will be able to deliver the flour. This the defendants decline to do. It is impossible therefore to maintain the position that the time for the delivery of the flour was extended either by permission or contract on the part of the plaintiffs. It cannot therefore be claimed that the contract set forth in either of the four last counts is made out by any proof extending the contract set forth in the first count, were such proof admissible for that purpose, and there can be no pretense that any such original contracts are proved. As to the first count, the court found that there was no breach by the defendants of the contract set forth in that count, inasmuch as he finds that the time for the delivery of the flour mentioned in that contract was extended by agreement between the parties until the 1st day of Oct. 1853. Consequently the recovery cannot be sustained under that count. The judgment cannot be sustained under the 1st count (which is the only one in any measure sustained by the proof) on the

ground that the proof showed an excuse for the plaintiffs not being ready and willing to pay for the flour at the time and place mentioned in that count, for the reason that proof of a fact not pleaded is unavailing. (*Field* v. *The Mayor &c. of New York*, 2 *Seld.* 179.) In order to recover under that count, the allegation in the count that the plaintiffs were ready and willing, &c. should be proved. (*Vail* v. *Rice*, 1 *Selden*, 155.)

III. There was no contract for the sale and delivery of the flour consummated. It is not pretended that an agreement was consummated, unless it be by the plaintiffs' letter of the 31st of August, 1853. Upon the question of consummating a contract by written correspondence, the following principle is laid down by Chitty in his General Practice, vol. 1st, page 118, in which he says: "If the negotiation is by letter and the last letter suggests any new or further proposition requiring some communication from the other party to complete the transaction, then no complete agreement is constituted." (*See also Slaymaker* v. *Irwin*, 4 *Whart.* 369–80.) The proposition on the part of the defendants to sell is contained in their letter of Aug. 30. The proposition is in these words: "We will engage to furnish you a boat load of flour last of next week, same quality sent Gilchrist & Mozer, at $4, 7s 6c. free to boat." The plaintiffs' answer to this proposition is in their letter of August 31, and in the following language: "We will take the boat load of flour as per your proposition in yours of the 30th inst. Please say to us how we shall remit." This question has never been answered. It will not be contended that the plaintiffs were not entitled to an answer to this inquiry, nor but that the defendants were at liberty to reply demanding payment by drafts on New York or in specie, at the time of delivery. It is clear that if the plaintiffs were entitled to an answer to their questions they had a right to accept or reject the answer. Otherwise their right to an answer would be nugatory. The plaintiffs being entitled to an answer could not of course have been made liable for non-acceptance of and non-payment for the flour until such answer was received. As it is evident therefore that owing to the state of the correspondence the defendants have never been in a situ-

ation when they could have maintained an action against the plaintiffs for non-acceptance and non-payment for the flour, had they tendered it on the 10th of September, agreeable to their proposition of the 30th of August or at any other time—it follows that the plaintiffs cannot maintain their action arising out of the same correspondence. To hold otherwise would be to discard the principle of mutuality in contracts, and to present the legal anomaly of a contract of sale in which performance may be enforced on the part of the seller without any corresponding obligation on the part of the purchaser. The minds of the parties had not met as to the time and manner of payment. In the opinion of the court it is said that "the law fixed the time and manner of payment." It is respectfully submitted that the law never fixes the time or manner of payment, except when the contract is completed and is silent in that respect. To say therefore that the law had fixed the time and manner of payment in that stage of the opinion has the appearance of assuming a conclusion.. If the letter of the plaintiffs of the 31st August had not been of a character calling for a reply which might have led to a breaking off of the negotiation (which seemed apparent and to be admitted in the opinion) the contract would have been complete, and the law would then have fixed the time and manner of payment. The plaintiffs, by the inquiry put to the defendants in their letter of 31st of August, prevented the law from fixing the time and manner of payment; and thereby reserved to themselves the right of determining the time and manner of payment by express agreement with the defendants. If this action had been one against the plaintiffs for not accepting and paying for the flour, it would be unsafe and consequently unsound to hold that the inquiry was made by the plaintiffs with no object to their own benefit or convenience, in the absence of all testimony warranting such a conclusion; especially when it is apparent that the answer, or their acceptance or rejection of it, might have relieved them from the onerous duty which otherwise the law would have imposed upon them, of paying the whole amount of the purchase money in cash at the time of the delivery of the flour. It need not be said that the same rules of con-

struction hold in an action brought by them. The following doctrine is laid down by Mr. Chitty in his General Practice, at page 118: "When the parties have contracted for themselves, no term or stipulation not expressed will be superadded by the court, although the court might readily conjecture what the parties intended or what would be reasonable. For courts are to construe, not to make, contracts for parties which they have omitted to make for themselves." The language which in legal effect is given to the plaintiffs' letter of the 31st of August, by the opinion, is as follows: "We accept your proposition to sell at $4.94 per bbl. payable in cash on delivery of the flour next week at our boat in Jordan. But to accommodate you we will remit in any other way by draft or otherwise if you desire it." This would appear to be in direct conflict with the well settled principles above laid down by Mr. Chitty. The court below finding or deciding that the legal effect of the letter is to speak in the language given to it by him, has virtually decided that no other construction can legally be given to it, no matter how apparent it may be that the writer intended otherwise. When a writer or speaker uses a given phraseology, he can never be said in legal effect to use a different phraseology. Whether he intends to be understood in a sense which may be more clearly expressed in a different phraseology, is always a matter of fact and not of law. The court, therefore, clearly erred in holding as a matter of law that the effect of the plaintiffs' letter of August 31, was such as is expressed by the language above quoted. If any effect is to be given to the supposed intention of the plaintiffs in making the inquiry, it is by no means apparent that it was made by the plaintiffs solely with the view (as the court substantially holds) of learning how they can best accommodate the defendants in the time and manner of payment, when the answer to the inquiry might have been of such a character as would protect the plaintiffs or enable them to protect themselves against the possible necessity of obtaining and transporting to the village of Jordan about $4000 in specie in payment for the flour. The plaintiffs in their letter of the 31st of August can with as much propriety be regarded as saying, "We will take

the flour on the terms expressed in your proposition, provided the time and manner of payment or remittance will accommodate us, of which please inform us," as using the language which the court says "in legal effect" was used. That the plaintiffs did not in fact intend what the court says was the "legal effect" of their letter is apparent from their letters of the 5th and 27th of Sept. In the letter of the 5th they ask the question again with apparent earnestness, "How do you want your pay and when?" which shows that they regarded themselves as still uninformed in that particular, and is entirely inconsistent with their having previously in substance or legal effect said (as claimed by the court,) "we accept your proposition to sell &c., payable in cash on delivery of the flour next week." In the letter of the 27th of Sept. they say, "as soon as we get the bill we will forward the pay," contemplating the previous delivery of the flour on board of their boats and the receipt of the bills by them at Fort Plain before "forwarding the pay." This is truly inconsistent with their having previously agreed to pay "in cash down at their boat at Jordan." It is submitted therefore that such was not the "legal effect," or the understanding of the plaintiffs, of their letter of August 31st. But whether such was or was not the intention of the plaintiffs is not the true question to be decided. It is this: Does it appear from the letters themselves so clear that it may be treated as a matter of law, that the plaintiffs were not entitled to an answer to the inquiry put in their letter, or if entitled to an answer that it must of necessity have been such in its legal effect as not to continue the negotiation open? But it seems evident that they were entitled to an answer, and that the effect of the answer might have been such as to leave the contract open, seems to be equally apparent and admitted by the opinion. It will be conceded that the letters prior to and including that of August 31, are to be put together as making one written instrument. The question arises, do they make a finished or perfect instrument? Justice Story, in *Powell and wife* v. *The Brinford Manufacturing Company*, justly remarks, that "it is dangerous to bolster up imperfect instruments by conjectures and inferences." (*See also Rawle on Cov-*

*enants for Title, p.* 109.) It is evident that the writing in this case cannot be treated as a perfect instrument unless by inferring, as the court have done, the object of the inquiry of the plaintiffs, in their letter of August 31, and that of a particular character, when it is possible and more than probable, that their real object was one of quite a different nature. Nor can it be treated as a contract without resorting, as the court have found it necessary, to the "addition" of "terms and stipulations not expressed," thereby, in violation of the rule above quoted from Chitty's General Practice, "making a contract for the parties which they have omitted to make for themselves." Inasmuch therefore as the inquiry of the plaintiffs in their letters as to the time and manner of payment were never answered by the defendants, it cannot be said that their minds had ever met on that point, and consequently no final agreement was constituted. It is evident that after an agreement has been once perfected it is not in the power of any one of the parties, by any thing he may say or do, to re-open it; and it is one of the most certain modes of testing the question whether a negotiation has ripened into a contract, to determine whether it is still in the power of any one of the parties to propose terms or reject those offered. The court, at fol. 100, say that "If the defendants had answered by proposing payment in specie, it might have left the contract open." While this is too plain a proposition to be denied, it seems to be equally plain, that as one of the parties had it in his power to "open the contract," or in other words to keep it open, no complete agreement had been perfected. When a contract should be in writing, to render it valid, and when it is sought to be established by a written correspondence, the silence of a party on a material feature, when interrogated in relation to it, should not be so construed as to render it a substitute for what ought to be in writing. Such, however, would seem to be the view taken by the court of the defendants' letter of the 1st of Sept. in answer to the plaintiffs' of the 31st, which was silent as to the inquiry of the plaintiffs in their letter. The court then says that the "contract is recognized," and that "the defendants intimate by their entire silence their desire and inten-

tion to permit that part of the bargain [terms or time of payment] to remain as the law made it, and the agreement therefore remained complete as before." By this it is intended substantially to say that the silence of the defendants upon the subject of the inquiry put by the plaintiffs, is equivalent to an assertion on their part; they desired the term of payment to be "cash down at the time and place of delivering the flour." It is submitted that such inference is inadmissible. But if such inference can be drawn from the silence of the defendants in their letter of Sept. 1st, it is evident that the plaintiffs did not so regard it, as they repeat the same inquiry in their letter of the 3d of September, answering the defendants' letter of the 1st of September. There is no pretense, therefore, for saying that the minds of the parties had met on that subject, because if the silence of the defendants in their letter of the 1st of Sept. is to be regarded (as the court substantially have held) as equivalent to an assertion on their part "that they claim the privilege of demanding cash at the time of delivery, it certainly cannot be said that the plaintiffs acquiesced in such assertion; otherwise they would not have again, in their letter of the 5th of September, repeated the inquiry, "How do you want your pay, and when?" The observation of the court that the defendants' letter of the 1st of Sept. recognized the "contract," and that the defendants' omission to answer "left the agreement complete as before," may be regarded as prematurely assuming that a contract or agreement had been perfected.

IV. The measure of damages was erroneous. The rule on this subject is correctly laid down by the court below, but the error consists in fixing the 1st day of October, instead of the 10th day of September, as the time at which the flour should have been "delivered by the contract," admitting that a contract resulted from the correspondence closing with the letter of Aug. 31, 1853. There can be no pretense for saying (under the rule adopted by the court below) that the difference between contract price and value on the 1st of October is the measure of damages, unless the time for the delivery of the flour had been extended to that date by a contract mutually

obligatory upon both parties, so that if the price of flour had been *less* on the 1st of October than on the 10th of September, the difference in value at that time would still have governed. That *such* a result could arise, from the nature of the transaction between the parties, will not be seriously contended. But such would be the result if a valid contract extending the time to the 1st of October had been made. There is not, however, any proof of such a contract. The plaintiffs have not only refrained from making such an extended contract, but from even giving the defendants permission to enlarge the time spoken of in the defendants' letter of 30th of August; so that they have never for a moment since the 10th of September, been prevented from demanding the flour and recovering for its non-delivery, provided the alleged original contract was valid. But if a dispensation to the defendants from a strict performance of the contract (if any) as to the time of the delivery of the flour had been given by the plaintiffs, the measure of damages in case of final non-performance, would relate back to the time of performance mentioned in the contract. Such seems to be the law as laid down in the case of *Hasbrouck* v. *Tappen*, (15 *John.* 200.)

V. The court below erred in receiving in evidence the letters dated after the 1st of September, 1853. for the reasons specified in the objection. They are no evidence of an extension of time, (for which object they were offered.) The letter of the 3d of September states a probable inability to deliver the flour as soon as expected. The plaintiffs' letter of the 5th of September, in answer, consents to no delay, but in reference to a delay asks the defendants to fix some day when they shall have the boat at Jordan, which certainly is no consent to a delay. The defendants in their letter of the 10th of September are not able to fix upon a day, but say they will do so the beginning of the week, but fail to do so. This is the defendants' last letter. Where then can evidence be found of even a permission, much less a contract, to extend the time of the delivery of the flour to the 10th of October, or any other time? (*Hasbrouck v. Tap-*

*pen*, 15 *John.* 200.) This evidence has influenced the court, as the report is based upon an extended contract.

VI. The court below erred in receiving the evidence of Hopcraft, objected to by the defendants' counsel. If this request of S. H. Dales had been made prior to the 10th of September, (the time of the expiration of the alleged original contract,) such evidence might be, in connection with other evidence, admissible to show a dispensation by the plaintiffs to the defendants from a strict performance. But this simple request, standing alone, and without proving or offering to prove the plaintiffs' assent to it, and more than all, after the alleged original contract had been broken, can furnish no evidence of an extension of such contract, much less of its revival.

VII. The court below erred in allowing the evidence of Boardman as to the value of wheat on the 1st day of October, 1853. The damages, so far as the value of the flour is concerned, are to be determined by the value at the time of the expiration of the written contract. (15 *John.* 200.)

*C. B. Cochrane*, for the plaintiffs. I. The proof establishes an agreement in writing between the respondents of the one part and the appellants of the other part, embracing all the legal essentials of a contract, perfect in all its parts and mutually obligatory upon the parties. (*Mactier* v. *Frith*, 6 *Wend.* 103, 115. *Vassar* v. *Camp*, 14 *Barb.* 341, 354. *Brisban* v. *Boyd*, 4 *Paige*, 17. *Chitty on Con.* 13, 14, 7*th*. *Amer. ed.* 1 *Parsons on Con.* 400, 407.) (1.) Conceding this to have been a contract of sale, and not for work, labor and services, (10 *Barbour*, 406,) it was a contract in writing, and good under the statute of frauds. A contract required to be in writing by the statute of frauds is valid, though subscribed only by one party, if the party to be charged. (*Chit. on Con.* 71. 2 *Caines*, 117. 16 *Wend.* 460.) A letter of acceptance referring to one containing the proposition, is a perfect compliance with the statute; so an offer by letter, if accepted, though acceptance be by parol; so also, letters constitute a valid agreement in writing, though a formal agreement in writing is contemplated by the parties.

(*Chit. on Con.* 397.) The negotiation in this case was conducted and the contract consummated by letter, a mode which the law recognizes. The elements of a valid contract are the same, whatever be the mode, and these are well defined and entirely settled. There must be parties capable of contracting; there must be a subject matter, or something to contract about; there must be mutuality, a consideration, and a concurrence of mind. There must be a proposition on one side and an assent to it on the other, and the assent must embrace all the essential terms of the proposition, without addition or limitation. "Where parties are together chaffering about an article of merchandise, and one expresses a present willingness to accept of certain terms, that willingness is supposed to continue, unless it is revoked, to the close of the interview and negotiations on the same subject, and if during this time the other party says he will take the article on the terms proposed, the bargain is thereby closed." So where a proposition is sent by letter, the proposition is held to remain open, presumed to be continually repeated, until the period of acceptance, and the moment the other party deposits in the post office a letter accepting the proposition upon the terms proposed, a bargain is struck, and the contract is complete and obligatory between the parties. (4 *Paige*, 17. 6 *Wend.* 103, 115, *and all the cases first above cited.*) (2.) Another rule is, that it is not at all material by which of the parties to an agreement the words which make it one are spoken. The intent governs, and if this be clear, and expressed with sufficient definiteness, it is enough. (1 *Met.* 93.) And the subsequent acts and conduct of the parties are competent evidence to show such intent, and confirm and ratify the contract. (1 *Cush.* 89. 13 *John.* 294. 6 *Wend.* 122, 123.) Still another rule is, that all the conditions of a contract, in order to its binding obligation, need not be expressed; where not expressed the law implies them. For instance, a promissory note need not express the rate of interest, or "value received," nor a contract of sale, when payment is to be made, or in what currency, or where the thing sold shall be delivered, or the precise time of delivery. Where in these respects the contract

is silent, the law comes in and fills up the blanks, and declares the intent of the parties. (3.) Tested by these rules of law, which are familiar and well settled, was there a contract proved between these parties such as the law will enforce? Under date of August 29, the plaintiffs, residing at Fort Plain, wrote to the defendants, residing at Jordan, and propounded the following question: "How low will you sell us a boat load of flour at your mill, to be same quality as that you sold to Messrs. Gilchrist & Mozer a few days since, and to be delivered some time next week?" To this the defendants replied the next day, August 30th, and submitted for our acceptance the following proposition: "We will engage to furnish you a boat load of flour the last of next week, same quality sent Gilchrist & Mozer, at $4.7-6, free to boat. Should you decide to have it, let us know by return mail, that we may make our arrangements accordingly." By return mail the plaintiffs answered: "Gents: We will take the boat load flour as per your proposition in yours of the 30th inst." Here was a literal acceptance of the very terms of the proposition, without increase or diminution. The two make a perfect contract in writing. It is difficult to conceive of a plainer case. The minds of the parties had met as to quantity, quality, price, time and place of delivery, and as to the time and manner of payment, for that is fixed by the law. The law says, the agreement was cash on delivery of the flour at the plaintiffs' boat at Jordan; and had the words "cash on delivery" been expressed in the proposition, the contract in this respect would have been no clearer, or better understood by the parties. Do the court doubt that both of these parties perfectly well understood, as business men, that by the agreement the terms were to be cash on delivery? Did not the defendants know that by the contract they had made they would be entitled to cash on delivery? Did not the plaintiffs know that they must pay cash on delivery? The law says they knew it, and they knew it in fact. Then their minds met; the plaintiffs' letter of acceptance in no way departed from the terms of the offer, or added to it. It is manifest by the very tenor of the reply that the plaintiffs intended to close in with the offer at

a single dash of the pen, which they did, and closed the acceptance by a period. Having accepted the whole proposition, and nothing else, they then, by way of a new paragraph, go on to state the probable day of the next week when their boat would be at Jordan. The words, "be sure the quality of the flour is uniform and such as you propose to give us, and put up in good packages," are no part of the acceptance, and were never meant or regarded as qualifying either the offer or acceptance, as is manifest from the subsequent acts and conduct of the parties. But even if a part of the acceptance, it does not affect its absolute character. It was saying simply, let the flour be uniformly of the same quality as that sold to Gilchrist & Mozer, as you have agreed it should be; not some better and some worse. It was merely a request, simply saying fulfill your contract. But the plaintiffs, after the contract was complete, write, "please say to us how we shall remit;" and it is contended that this shows that the time and manner of payment was still an open question, and hence there was no contract. This is not the correct interpretation, nor the one which the parties have by their conduct put upon it. The plaintiffs by this language did not and could not reserve to themselves any thing. The words, "please say to us how we shall remit," were precisely equivalent to saying "command us as to how we shall remit," we have agreed to pay and expect to pay cash on delivery, but if you prefer a draft on New York or any other mode more convenient to yourselves, you have only to command us, we make the suggestion for your accommodation. The defendants did not choose to change the contract or command us in that respect, and understanding the agreement as they did, the plaintiffs went to Jordan with the money in their hand. But how can the idea of no contract be reconciled with the subsequent conduct of these defendants? See subsequent letters. The defendants, by their letters and interviews, continued to assure the plaintiffs, though in the "midst of disappointments," that the flour should be forthcoming, that the fulfilment of the contract was but a question of time, and thus not only recognized the contract, but induced the plaintiffs to expect this

flour, and not look for a supply in any other quarter. It is too late after this to change their ground and say they were mistaken, there was no contract. They are estopped. (4.) The proof shows the plaintiffs' letter of the 31st of August was sent by return mail. The plaintiffs' boat carried 800 barrels; 800 barrels is an ordinary boat load. The flour sold Gilchrist & Mozer was the "Skaneateles Lake Mill Brand," a well known brand.

II. Whether the minds of the parties met, so as to constitute a valid contract, was a question of fact, and the finding of the judge, like the verdict of a jury, is conclusive. (1 *Cush.* 89. 13 *John.* 294.)

III. The complaint is well drawn, and the facts therein stated constitute a perfect cause of action. In an action for non-delivery of goods sold, it is sufficient to aver that the plaintiffs were always ready and willing to receive and pay at, &c. This the plaintiffs have done. (1 *Parsons*, 448, 9, *and note.* 12 *John.* 209, 211, 212. 12 *Wend.* 408. 5 *John.* 179.) The plaintiffs not only averred that they were always ready and willing to receive and pay at the place mentioned, but proved it upon the trial. "An averment that he was always ready, necessarily relates to the time of delivery." The complaint is according to approved precedents.

IV. It was not necessary that the complaint should contain an averment that the time was extended, in order to admit evidence that the plaintiffs at the request and upon the application of the defendants, had consented to or acquiesced in an extension of the time of delivery. The object of the evidence was not to show that a new contract had been made, or any stipulations of the contract changed or waived, but to show that the contract as made was kept on foot by the parties. The general rule may be, that an averment of performance will not be sustained by evidence of a legal excuse for non-performance. (7 *Barb.* 169. 8 *id.* 327.) But it is submitted, that neither the rule nor the reason of it, applies to a case of mere extension of the time of performance, when the objection comes from the party at whose request and for whose accommodation

the extension has been granted. The reason of this rule of pleading in the cases where it applies is, that the excuse of matters constituting it often forms a material issue of which the defendant has a right to be informed by the pleadings. No such reason exists in this case. The complaint is not that the defendants did not deliver the flour by the 10th of September, or did not deliver in time, by which the plaintiffs lost great gains, &c. The real complaint and breach assigned are, that the defendants refused to deliver at any time. We did not get the flour, and thereby lost great gains. This complaint is abundantly sufficient within the case of *Crane* v. *Maynard*, (12 *Wend.* 408.) Besides, as the learned justice who tried the cause, in his opinion remarks, "The defects, if any, are those which have occasioned no surprise to the defendants, nor prevented them from availing themselves of all the grounds which they could interpose." The defense, in whatever aspect it can be viewed, is inequitable, and purely technical, and if necessary, the court will direct the complaint to be amended, or deem it amended, so as to conform it to the facts proved. The power of the court, and the propriety of its exercise in this case, cannot be doubted. (*Code*, § 173. 1 *Kernan*, 237, 242.)

V. The rule and measure of damages were correctly applied. The plaintiffs, at the repeated and continued request of the defendants, had indulged the latter by consenting to an extension of the time of delivery as long as it was consistent with the plaintiffs' rights. The defendants representing each time, not that there was no "legal contract," and that they were not bound to delivery, but that in consequence of unforeseen obstacles and "disappointments," they could not deliver at the time promised. When, therefore, the plaintiffs, on the 1st day of October, demanded the flour and tendered the price, they were entitled to receive it. Consequently they are entitled by way of damages, to the difference between the contract price and the market value at that time. (2 *Sandf.* 127. 9 *Wend.* 129, 135. 24 *id.* 322.)

VI. The objections made to the introduction as evidence of the several letters which passed between the parties subse-

quent to the making of the contract, are principally upon the ground that they were not admissible under the pleadings, no extension of time being averred, and have been already sufficiently answered. The objection made to the evidence of the witness. George Hopcraft, rests upon no better foundation. An extension of the time for the delivery of articles under a written agreement, is not a waiver of any of its stipulations, but a mere enlargement for the time of its performance, and may be proved by parol. (*Chitty on Con.* 111. 9 *Wend.* 68. 15 *John.* 200. 12 *Wend.* 408. 4 *Barb.* 615.) The clear and well-reasoned opinion of Justice Allen covers all the ground presented by this case, and renders an argument by counsel quite unnecessary.

*By the Court*, Bockes, J. On a motion for a new trial on a case, where the cause is tried by the court without jury, its decision on questions of fact is to be treated and regarded the same as would be the verdict of a jury, or the report of a referee. (*Mann* v. *Witbeck*, 17 *Barb.* 388. *Osborn* v. *Marquand*, 1 *Sandf. S. C. R.* 457. *Oakley* v. *Aspinwall*, 2 *Sandf.* 7. *Gilbert* v. *Luce*, 11 *Barb.* 91.) The decision on the facts must therefore be conclusive upon the court in bank, unless the preponderance of evidence is so great that the verdict of a jury to the same effect, on the same testimony, would be set aside, or unless there is a total failure of evidence to give the decision support. A difference of opinion where there is a conflict of evidence is not to be indulged, to affect the verdict of a jury, the report of a referee, or the decision of the court on the facts, in case of trial without jury. (*Van Steenburgh* v. *Hoffman*, 15 *Barb.* 28.) In this case, however, there is no conflict of evidence. The proof is explicit; and the principal question to be considered is whether it establishes a valid agreement between the parties.

The mode of contracting adopted by the parties in this case is well recognized by law, and possesses great merit by reason of the perspicuity and certainty generally attending it. Perhaps there is no other mode equally convenient, more satisfactory or

less liable to admit of misapprehension or misconstruction. In the case under consideration the facts are too plain to admit of doubt or mistake. The defendants proposed to the plaintiffs as follows: "We will engage to furnish you a boat load of flour, the last of next week, same quality sent Gilchrist & Mozer, at $4. 7–6, free to boat." This proposition, dated and sent on the 30th August, was answered by the plaintiffs immediately, as follows: "We will take the boat load flour as per your proposition in yours of the 30th inst." The proposition was brief and explicit, and its acceptance clear and unqualified. So soon as the letter of acceptance had gone beyond the plaintiffs' control, the bargain was complete. Nothing remained but to carry it into effect, and it became mutually obligatory upon the parties. (*Mactier* v. *Frith*, 6 *Wend.* 103. *Brisban* v. *Boyd*, 4 *Paige*, 17. *Vassar* v. *Camp*, 14 *Barb.* 341. *Story on Con.* § 384.)

It is conceded that the proposition fixed the price, kind, quality and quantity of the article, and place of delivery, and it might be added, also, that it fixed the time of delivery, for it did so with sufficient certainty. The offer was accepted without any qualification. The contract was therefore complete, and could not be rescinded by either party without the consent of the other. True, it was silent as to the time and manner of payment, but in such case the law determines that. Payment must be made in such case on delivery, and in legal currency. (*Thompson* v. *Ketcham*, 8 *John.* 189. 2 *Kent*, 496. *Story on Con.* § 803. *N. Y. Ins. Co.* v. *De Wolf*, 2 *Cow.* 57, 105, 6. *Chapman* v. *Lathrop*, 6 *id.* 110. *Cornwall* v. *Haight*, 8 *Barb.* 327.) The defendants were bound to deliver the flour, and the plaintiffs to pay for it, each according to the contract.

The letter of acceptance contained this inquiry: "Please say to us how we shall remit?" and it is contended that this inquiry qualified the acceptance of the defendants' proposition. The argument is that if the plaintiffs were entitled to an answer to this question, they had a right to accept or reject the answer, whatever it might be. Admit this, and it proves nothing affecting the original proposition and its acceptance. It was

no more than if the plaintiffs, instead of inquiring how they should remit, had inquired if the defendants would exact gold and silver in lieu of bank bills. In *Brisban* v. *Boyd*, (4 *Paige*, 17,) the letter of acceptance contained a request that the cotton should be designated and marked on joint account, and that information should be given when it was shipped. In that case it was insisted that there were conditions imposed upon the acceptance of the proposition. But the chancellor held that the letter was an unconditional acceptance of the offer to which it was an answer; and that what was said as to designating and marking the cotton and informing them of the time of shipment, was merely directory as to the manner in which they wished the cotton to be sent. The case of *Brisban* v. *Boyd*, was much more favorable to the view taken by the defendant's counsel, than is the one under consideration; for in that case there was some propriety in the suggestion that the designating, marking, and immediate information, requested, entered into and formed part of the contract. But in this case, the utmost force that can be given to the interrogatory is, that the plaintiffs by a reply wished to know whether the defendants would insist upon and exact in regard to payment, strict performance of the agreement; and it may be added, that the defendants' silence was, in legal effect, an answer that they should.

But the plaintiffs were not legally entitled to any answer to the question. The defendants so understood it, and remained silent. That they so understood it is evident from their subsesequent letters recognizing the agreement as closed and binding.

The decision filed by Justice Allen states "that the time for the delivery of the said flour was, by the agreement of the parties in writing, on or about the 3d of September, extended for a reasonable time until the 1st of October, 1853," and that such extension was granted "at the sole request of the defendants;" and further "that the plaintiffs were at all times ready and willing to accept, receive and pay for the flour," according to the contract.

The contract, as evidenced by the proposition of the 30th

August, (Tuesday) and its acceptance, the following day, (Wednesday,) specified the time of delivery as "the last of" (the then) "next week." On Thursday, the 1st of September, one of the defendants requests the plaintiffs by letter "to make it," that is the delivery, "as late in the week as they conveniently could." Two days after, and on Saturday the 3d September, the defendants address another letter to the plaintiffs in which they state that they were in the midst of disappointments, and that it would be impossible to get the flour ready as soon as was expected, but added "it shall be got out just as soon as possible." The plaintiffs, by letter dated the 5th September, (Monday) acknowledged the receipt of this letter, and inquired when the wheat would be ready for delivery. This was on Monday of the week, the last of which, by the terms of the original agreement, the flour was to be delivered. On Saturday, the 10th of September, and the last day for the delivery, the defendants answer the plaintiffs' letter, and say that in the beginning of the next week they would be able to inform them when they could deliver the flour. Notwithstanding the plaintiffs addressed to the defendants two letters, one under date of September 20th and the other September 23d, inquiring when the flour would be ready, nothing more was heard from the defendants by letter. But it seems that on the 22d or 23d of September, Stephen Dales saw one of the plaintiffs, and requested them to put off sending for the flour about a week. At the end of this week, September 30th, the plaintiffs were at the place of delivery ready to perform, and on the next day, October 1st, made a demand formally, in writing, for the flour, and offered payment. Dales refused to deliver it, and gave as a reason that "he did not consider there was a legal contract." The refusal was not put on the ground that the plaintiffs had failed in any respect to fulfill, but on the ground that there was no legal contract. It has been shown that there was, and the defendants, not having fulfilled it and having refused to perform it, must atone for the injury occasioned by their neglect and refusal. By the letter of the 5th September, the defendants promised to deliver as soon as possible; and by the letter of the 10th they

promised to inform the plaintiffs when they could deliver, and on the 22d or 23d, Dales did inform them, in substance, by requesting them to put off sending the boat for the flour about one week. To all these delays the plaintiffs acceded. It was well found, therefore, that the time of performance was extended, at the defendants' request, and with the plaintiffs' consent, to October 1st. It was competent for the parties by a subsequent contract to agree on such extension. (*Frost* v. *Everett*, 5 *Cow.* 497. *Blood* v. *Goodrich*, 9 *Wend.* 68. *Cummings* v. *Arnold*, 3 *Metc.* 486. *Crane* v. *Maynard*, 12 *Wend.* 408. 1 *John. Ch.* 22. 7 *Cowen*, 48. 1 *id.* 249.) Even the time of performance of a sealed instrument may be enlarged by parol. (*Esmond* v. *Van Benschoten*, 12 *Barb.* 366, *and cases cited.*) But the enlargement of the time of performance of an agreement under seal should be regarded rather as a waiver of strict performance, that is, the parties consent to accept performance at a future day, and when a party procures delay he shall not be allowed to urge it for his own protection. (*Young* v. *Hunter*, 2 *Seld.* 203.) In *Keating* v. *Price*, (1 *John. Cas.* 22,) the action was on a simple contract for the delivery of staves on or before the 1st of May. The defense was that the plaintiff had extended the time for delivering them until the next spring. The extension was held valid, and a nonsuit entered. This case is referred to and approved in *Dearborn* v. *Cross*, (7 *Cow.* 48, 50.) In *Erwin* v. *Saunders*, (1 *Cow.* 249,) it was held that simple contracts in writing might be varied by a parol enlargement of the time of performance. Nor is a new consideration necessary to give validity to an agreement to extend the time; the waiver is enough for that purpose. (14 *Serg. & Rawle.* 241.) The effect of such enlargement is to substitute or adopt the extended time for the time specified in the original contract. It then stands as a new agreement, wherein the mutual promises furnish a good consideration. (*Evans* v. *Thompson*, 5 *East*, 189, 193. *Hasbrouck* v. *Tappen*, 15 *John.* 200, 204.) It is a new agreement substituted for the former one, by which the parties agree in all respects as formerly, except as to the time of performance, which they then fix for a future period. And

it is under the new substituted agreement that redress must be sought in case either should fail or refuse to perform.

It follows therefore, that on the 1st day of October, the defendants were bound to deliver the flour, and the plaintiffs to pay for it. The plaintiffs were ready at the place, and willing to perform the contract, but the defendants refused; and this brings us to the question of damages.

It has been shown that the defendants were bound to deliver the flour on the 1st day of October, and that they refused to do so. The difference therefore between the contract price and the value of the flour agreed to be delivered on that day, with interest from that period, was the true measure of damages.

It is insisted that the complaint does not state facts sufficient to constitute a cause of action; and the point of objection is, that it does not aver a readiness and willingness to pay *at the plaintiffs' boat.* The authorities and precedents are to the point, that when one agrees to sell and deliver *at a particular place*, and the other agrees to receive and pay, an averment by the purchaser of a readiness and willingness to receive and pay *at that place*, in case he sues for a non-delivery, is indispensably necessary to a good complaint. In this case the contract, as stated in each of the five counts, was, to deliver the flour at a particular place, to wit, at the boat, at Jordan, yet neither of the last four counts avers a readiness and willingness to receive and pay *at that place.* The objection, under the old practice, would have been fatal to those counts if taken by *special* demurrer. It was suggested that the words "as aforesaid," in the first count, following the averment of a readiness and willingness to receive and pay, remedied this defect in that count; but it is doubtful whether those words, as there used, are not totally unmeaning. But it is quite unnecessary to reason or cite authorities on this question, inasmuch as each count, under the practice before the code, would have been held good after verdict. This objection comes up like a motion in arrest of judgment under the former practice. On such motion the verdict was deemed to cure, or supply the defects or imperfections in the statement of the case. (*Bayard* v. *Malcolm*, 2 *John.*

550, 571. *Owens* v. *Morehouse*, 1 *id.* 276. *Leffingwell* v *White*, 1 *John. Cas.* 99. *Carpenter* v. *Brown*, 6 *Barb.* 147.) In the last case cited, it was held that the omission to allege a time and place is not an available objection to the declaration, in arrest of judgment or on general demurrer. In *Addington* v. *Allen*, (11 *Wend.* 374,) it was decided in the court of errors on motion in arrest of judgment, "that the facts which will after verdict be presumed to have been proved, are those which though entirely omitted to be stated in the declaration, are so connected with the facts alleged that the facts alleged cannot be proved without proving those omitted." This decision covers the case under consideration. A readiness and willingness to perform is averred, and could not be proved, so as to authorize a verdict for the plaintiffs, without also proving a readiness and willingness so to do *at the place*. Each count is based on a valid agreement as the same is set forth in the pleading; and a breach by the defendants is well stated; there is also an averment of performance by the plaintiffs, but it is imperfectly alleged in the particular specified. This statement makes just the case which a verdict is deemed to cure. (*Code*, § 176.)

Again, by section 176 of the code it is provided that "the court shall in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

There is some difficulty in applying the facts of this case to either count of the complaint. They best apply to the second and fourth counts. The second count sets up the original agreement, and an extension of the time of its performance one week; and the fourth count sets up an original contract to deliver on the 1st day of October. It is therefore but a question of variance between the facts found, or proof, and the complaint. Nor can it be pretended that the variance has actually misled the defendants to their prejudice, in maintaining their defense on the merits. (*Code*, § 169.) In *Fay* v. *Grimsteed*, (10 *Barb.* 321,) it was held that a variance between the pleadings and the proof, sufficient to defeat the action or destroy

the defense, must leave the case unproved in its entire scope and meaning. The questions at issue on the pleadings among others were, as to the extension of performance of the original contract, and also as to the defendants' duty to deliver on the 1st of October. The defendants were, by the pleadings, ap prised of the plaintiffs' purpose to introduce evidence on those questions, and hence had the opportunity to make preparation for a full defense on the merits to the case as proved on the trial. The variance, therefore, cannot be deemed to affect the substantial rights of the parties.

Notwithstanding the variance between the pleading and the proof is deemed immaterial, an amendment of the complaint is considered admissible and appropriate, for the purpose of securing certainty and harmony in the record. Section 173 of the code contemplates a case like the present. It provides for an amendment of pleadings, as well after as before judgment, by inserting allegations material to the case, or "*by conforming the pleading or proceeding to the facts proved*, when the amendment does not change substantially the claim or defense." (*Bate* v. *Graham*, 1 *Kernan*, 237.) Whether the amendment should be ordered at general term and without formal notice of motion for that purpose, or on notice as a special motion, is a question of practice, not entirely settled. In *Gunter* v. *Catlin*, (11 *Leg. Obs.* 209,) Duer, J., remarked, "We have now indeed a large discretion in amending pleadings, so as to conform them to the facts of the case as disclosed by the evidence, and we have not unfrequently exercised this power at a general term, even where no motion to amend had been made upon the trial;" by which it may be understood—although it does not necessarily follow from the language—that a formal notice of motion was not required. But see *De Peyster* v. *Wheeler*, (1 *Sandf.* 719, 720.)

In a case like the present, where the amendment is only to conform the pleading to the facts specifically found by the court, and where the record furnishes the only grounds for and against the amendment, a motion is quite unnecessary.

The judgment must be affirmed, with costs, with liberty to

the plaintiffs to amend the complaint. The amended count should set out the original contract as in the first count, and should aver an extension of the time of performance for a reasonable time, to wit, to and until the 1st day of October, 1853, and a readiness and willingness to receive and pay on that day by the plaintiffs, at the boat, at Jordan.

[Schenectady General Term, May 7, 1855. *Bockes, C. L. Allen* and *James*, Justices.]

## The People *vs.* Imlay.

The act of April 8, 1851, relating to life insurance companies does not prohibit any citizen of this state from applying for insurance to a foreign company which has not complied with the act, on his own account; nor from doing so by his attorney; nor from receiving the policy here, by mail, when issued in another state; nor, as a consequence, from receiving it here through his attorney. But it prohibits the agent of a foreign company from making such delivery.

The act does not attempt to prevent a foreign insurance company which has failed to deposit the security required to be given by it, from insuring our citizens; nor does it impose a penalty upon an agent of such a company for acting for it, if he acts out of this state.

Signing a policy in Philadelphia, by an insurance company located and doing business there, and sending it to the applicant, or the attorney of the applicant, in New York, is not a violation of the statute.

The prohibition is expressly limited to the acting *within this state* as agent of a foreign insurance company. And the act only intended it to apply when the actual agency was in this state, and the thing done was actually done in this state.

It is not a violation of the act for a person in this state to act as attorney for an *applicant* to a foreign insurance company; provided the attorney is in good faith acting only as the attorney of the applicant, and not as the agent of the company, under cover of an attorneyship for the applicant.

The act of April 8, 1851, was not a violation of the article of the constitution of the United States by which the citizens of each state are entitled to all the privileges and immunities of citizens in the several states.

An incorporated company is not a *citizen*, within the meaning of that section (*Const. art.* 1, *sec.* 1.)

The People *v.* Imlay.

MOTION by the defendant, for a new trial, upon a case. The people brought their action against the defendant, for a violation of the "act in relation to *all* insurance companies, transacting the business of life insurance within this state." (*Laws* 1851, *ch.* 95, *p.* 167.) The 3d section of the act relates to agents of foreign companies; placing them on the same basis as domestic companies, and is as follows: "It shall not be lawful for any person to act within this state, as agent or otherwise, in receiving or procuring application for insurance in, or in any manner to aid in transacting the insurance business of any company or association, not incorporated under the laws of this state, until he has procured a certificate from the comptroller, that the company or association, for which he acts, has complied with all the provisions of this act." On the 25th Sept. 1851, the defendant was secretary of the United States Insurance, Annuity and Trust Company, located at Philadelphia. This company did not comply with the act of 1851, by depositing $100,000 with the comptroller, as security for the policy-holders. At the time of the passage of this statute, this company were carrying on business in the city of New York, having their office in Nassau street. They had a sign, with the name of the company, over the door, which remained up when the policy in question was issued. It was alleged, on the part of the defendant, that this office was only kept open for the receipt of premiums on old policies, the defendant, as secretary, or Mr. Fisk, the actuary, remaining in charge of it; but it appeared that applications for policies were made by four persons, at this office, which were received by the actuary of the company, and some of the policies were delivered to the parties by the defendant. The applications were received by Mr. Fisk, who pretended to act as the agent of the parties; but it appeared he was, meanwhile, the actuary of the company; did not receive any compensation from the applicants, was supplied by the company with printed powers of attorney in blank, indorsed on the applications for insurance, designed only to be used for this company. The defendant subscribed his name on the policy as the "secretary or agent authorized to receive premiums,"

was at the office of the company in New York on the day on which the receipt for the money purports to have been signed by him which was indorsed on Kendrick's policy. After the passage of the statute, the defendant proposed to Huntington, in reference to continuing the business, "to go on, law or no law," and declared that "he would go on, law or no law." It was proven, that the written part of the policy was in the handwriting of the defendant, as also his signature as secretary, and that the defendant knew the residence of the party, and that the policy was to be delivered in the city of New York.

The cause was tried at the New York circuit, in April, 1853, before Justice EDMONDS and a jury.

A motion was made to dismiss the complaint, on the ground that the evidence did not sustain the charge, which motion was denied, and the defendant excepted. In order to charge the defendant with Fisk's acts, in respect to this policy, the plaintiffs proposed to give in evidence the acts of the defendant and Fisk in respect to four other policies to other persons. The evidence was objected to, admitted, and an exception taken by the defendant. At the close of the testimony the defendant asked the court to charge the jury, 1. That unless the jury found that the United States Insurance, Annuity and Trust Company did business as a Life Insurance Company in New York, on the 25th of Sept. 1851, the plaintiffs could not recover. 2. That unless the jury found that the defendant acted as secretary of said company in New York at that time, the plaintiffs could not recover. 3. That unless the jury found that while acting as such secretary, and for said company, he issued the policy in New York, in September, 1851, the plaintiffs could not recover. 4. That unless the jury found that the policy was issued by the defendant for a premium paid to him by Kendrick in New York, in September, 1851, the plaintiffs could not recover. 5. That unless the jury found that the defendant was, on the 25th of September, 1851, a resident agent in the city and county of New York of the said company, the plaintiffs could not recover. 6. That unless the jury should find that at the time the said company had an agency in the city of New York, the plaintiffs could not recover. 7. That

signing a policy in Philadelphia, and sending it to the applicant or attorney of the applicant in New York, was not a violation of the act of 1851. 8. That it was not a violation of the act of 1851, for a person in New York to act as attorney for an applicant to a foreign insurance company, in applying for insurance at the office of the company, in the foreign state. 9. That if the jury should find that the policy in question was signed by the defendant in Philadelphia, and there mailed to Mr. Fisk in New York, and when mailed was beyond the reach of the defendant, he was not liable in this action. The court refused to charge in any particular as requested, but charged as follows: "Our legislature passed a law in 1851, directing certain arrangements to be made by insurance companies. This company had an agency here before the law. The company did not make the deposit required by this law. Huntington testified that the defendant said 'he would go on, law or no law.' The question then is, whether he has gone on in violation of law. You must find this fact in order to convict the defendant. You must find whether this was or was not a contrivance to avoid the law. The question as to whether the receiving of premiums on old policies, is or is not a violation of the law, is not raised here." The judge here read to the jury the 3d section of the act under which the action was brought, and told the jury it was for them to decide the simple question whether the defendant had acted in this state in issuing the policy to Kendrick. "The defendant alleges he was bodily in Pennsylvania, and could not act here, although he might have sent the policies on. The whole of it is a question of fact for you to decide. If the defendant acted in this matter in good faith, you must find in his favor." The judge refused to charge upon the matters requested by the defendant's counsel, further or otherwise than he had already charged. The defendant's counsel excepted to the refusal of the judge to charge as requested, and in each particular as requested, and also to the judge's charge as given, in the following respects: in stating that the question was whether the defendant has gone on in violation of law; whether there was or was not a contrivance to avoid the law; whether the defendant had acted in this state in

issuing the policy to Kendrick, and that the whole of it was a question of fact for the jury to decide.

The jury found a verdict in favor of the plaintiffs, for $500.

*D. D. Field*, for the defendant. I. The act of 1851 is unconstitutional.

II. If the act be constitutional, its penalties attach only upon an agent established or situated in the county where the action is brought. (§ 9.) There was no pretense that the defendant was such an agent.

III. This being a penal action, great strictness in respect to the proof should have been insisted on, and the plaintiffs should have been required to prove the charge precisely as laid.

IV. The motion to dismiss the complaint should have been granted, there having been no evidence sufficient to warrant the jury in finding the allegations true.

V. The evidence respecting the other policies was improperly admitted; the result being, that the defendant was charged with one act and judged for another.

VI. The court ought to have charged as requested by the defendant's counsel.

VII. The charge was erroneous in the particulars excepted to. It led the jury away from the precise issues before them, into the general question, whether the defendant had violated the law, or entered into a contrivance to avoid it. It was not a question, whether the defendant had acted in good faith, or whether he and Mr. Fisk had engaged in a contrivance to avoid the law, or had violated it, but whether the defendant had done, in this state, the particular act charged against him in the complaint.

*A. Oakley Hall*, district attorney, for the people. I. The act, ch. 95, Laws 1851, is constitutional. It is the right of the legislature of every state to make regulations controlling individuals and corporations doing business within its limits. This act applies to all corporations, whether foreign or domestic, and applies the penalties in the only mode in which they could

be imposed, in order to prevent the evil sought to be guarded against. (1.) No doubt can exist, nor was the question suggested by the defendant's counsel at the circuit, as to the constitutionality of those provisions of the act which related to *domestic* companies. (2.) The state has the same right to regulate and prescribe the terms and conditions upon which all *foreign* companies may come into this state to transact business; it may even prohibit them altogether, in the same manner in which it could prohibit a domestic company. It is as much the duty of the state to protect its citizens from imposition from the one, as it is from the other. "If irresponsible insurance companies may force themselves upon us in defiance of our laws, state sovereignty is but a name." (3.) Nor is it any objection, that the law is made to operate directly upon the agents themselves. The corporation is beyond our reach. The agent is the active instrument in accomplishing the illegal act; he is the willing instrument of the violation of the law. The exemption claimed by the defendant would give to the citizens of other states greater rights and privileges within our borders than are enjoyed by our own people. (*Bank of Augusta* v. *Earle*, 16 *Peters*, 519, 586. *The People* v. *Thurber*, 13 *Ill. R.* 564. 8 *How. U. S. R.* 490.) (4.) To be unconstitutional, a law must be *plainly and manifestly* in collision with some constitutional provision. (*Scott* v. *Stuart*, 1 *Mann. Mich. R.* 595. *Fletcher* v. *Peck*, 6 *Cranch*, 87, 122. *Calder* v. *Bull*, 3 *Dallas*, 386.)

II. The act is remedial. It was intended to provide a security for those effecting insurances, against the insolvency of the companies; at the time of the passage of the act the evil existed to an alarming extent. Being a remedial statute, it should be construed largely and beneficially, so as to suppress the evil. Under the facts of this case we need only ask that the words be construed according to their fair import. (*Dwarris on Statutes*, 735.)

III. The defendant was an agent, within the fair import of the words of the act. (1.) The 7th section of the act of 1849, providing for the incorporation of insurance companies, (*Laws*, *p.* 441,) declares "the term agent or agents, used in this section,

shall include any acknowledged agent or surveyor, or any other person or persons who shall in any manner aid in transacting the insurance business of an insurance company not incorporated by the laws of this state." These acts are to be construed together, (*see 10th section of the act of* 1851,) and the 7th section of the act of 1849 remains in full force. (2.) Any person who shall aid in transacting the business, is made liable—it is not limited to resident or established agents. The bodily presence of the agent was not necessary; but it was left to the jury as a question of fact to say where the defendant was at the time the policy was issued. It was established by the evidence that the defendant had agreed to bring the policies with him to this city from Philadelphia, and that he was here on the day upon which the policy was delivered. (3.) The bodily presence of the defendant was not necessary. Even in criminal courts it is well settled that personal presence at the place where a crime is committed is not indispensable to make one a principal offender in its commission. An offense, consisting of several parts, is committed where the enterprise is consummated and took effect. The defendant was "situated," within the meaning and intent of the act, in this city; he was present by the instruments used by him to effect his purpose. (*People* v. *Adams*, 3 *Denio*, 190.) (4.) The law will not tolerate any contrivance or subterfuge to evade its provisions, and render it nugatory. The jury were instructed to find whether the course pursued by the defendant was a contrivance to avoid the law, and that if the defendant acted in good faith in the matter, he was not liable.

IV. The court, after reading to the jury the section of the statute, under which the action is brought, properly submitted it to the jury to find whether the defendant had acted in violation of its provisions.

V. The evidence as to the other policies was properly admitted. It was competent to show that the defendant did not act in good faith. Where the question of the intent of the party, in the particular transaction with which he is charged, is involved, cotemporaneous acts, similar to the offense charged, are compe-

tent to establish the *quo animo*. Such is the rule in cases of fraud, libel, slander, and in the criminal courts, where the *intent* with which the party acted in the particular transaction is the gist of the offense. (*Jackson* v. *Timmerman*, 12 *Wend.* 299 1 *Phil. Ev.* 472, 475. 1 *Cow. & Hill's Notes*, 326, 328.)

VI. The charge was, in all respects, correct, and the plaintiffs are entitled to judgment upon the verdict.

*By the Court*, MITCHELL, P. J. This action was brought against the defendant under sections 3 and 9 of the act of 1851, ch. 95. The complaint alleged that the defendant, at the city of New York, on the 25th of Sept. 1851, acted as secretary of the United States Insurance, Annuity and Trust Company, the said company as such doing business as a life insurance company in said city, and that the defendant, while so acting, issued for said company for a premium *then and there* paid by one Kendrick, a policy of insurance on the life of Kendrick; and that the company had not deposited with the comptroller $50,000, and had not procured a certificate from the comptroller that the company had complied with the provisions of the law of 1851.

The evidence showed that such a policy was issued, at the date specified, by the above named company, and that the company had not complied with the law. That law makes it unlawful for any person to act *within this state*, as agent or otherwise, in receiving or procuring applications for insurance, or to *aid* in transacting the business of any company not incorporated under the laws of this state, until he has procured the certificate of the comptroller as above mentioned; and every violation of the act subjects the offender to a penalty of $500, to be recovered in the name of the people, by the district attorney of the county in which the company or the agent is "situated;" and in case of non-payment, the act declares the party offending shall be liable to imprisonment for a period not exceeding six months, in the discretion of any court having cognizance thereof.

When parties know what the law is and mean to violate it

they endeavor to conceal their purpose by acting by indirect means. The plaintiffs' theory was that the defendant had arranged or conspired with Fisk, that they should procure insurances in the city of New York for the company, of which he was secretary, in violation of the law. The defendant, to meet this charge, endeavored to show that it was Fisk who acted in this city, and that Fisk acted, not for the company, but as the special attorney of persons applying to him. The question then was, with what object, what motive, were Fisk and the defendant acting. Was it with the object and motive of being the attorneys of the applicants, or with the object and motive of getting policies for this particular company. If the last were the motive, then in fact they were the agents of the company, although they should attempt to disguise it by taking special powers of attorney from each applicant. The plaintiffs accordingly proved that before the act of 1851 was passed, Huntington had been the agent of the company, and that he left the company because they would not comply with the law, and that the defendant, the secretary of the company, *proposed to him to go on, law or no law*, and he refused. That Fisk had been actuary of the company; that the company continued Fisk in their employ in an office in this city, of which they paid the rent, and continued his salary of $500 a year; that Fisk had blank forms ready for the appointment of a person as attorney, to be signed by applicants for insurance; and that he procured this policy and three others, but did not act as attorney for any one applying *to any other company;* that he received his salary, as above stated, from the company, but *no* compensation from the applicants. The proof that Fisk acted as attorney for a single individual would be very slight evidence that the acting as attorney was a cover, and that he was in reality the agent of the company; but if it could be proved that he acted in a hundred instances as such attorney, and always on policies to be issued by this company and by no other, it would be indisputable evidence that he was in fact the agent of the company. The proof that he so acted in other instances than that of Kendrick was admissible, although the proof is not as strong

as in the case supposed. The facts above stated showed such a connection between Fisk and Imlay, and such a purpose of Imlay to have some one to act as agent of the company, "law or no law," as to justify a jury in finding that Fisk was acting in combination with Imlay, or Imlay acting as agent of the company, through him. This was strengthened when it was shown that when Fisk went to Philadelphia Imlay took his place, and received the premiums in two or three other cases from the applicants in this city. If it had been proved that in 50 other cases he had thus received premiums in this city, the concert between him and Fisk that Fisk should act for him, or that both should be agents of the company, in this city, would have been clearly made out. In the case of Kendrick, Fisk received the money in this city and sent it on to Philadelphia and Imlay indorsed the policy acknowledging the receipt of the premium on the 19th or 25th of Sept. 1851.

The judge was requested to charge as follows, but refused:

1. That unless the company did business as a life insurance company in New York on the 25th of Sept. 1851, the plaintiff could not recover. This made the precise day material, and required that the company, and not the agent merely, should do the act in New York.

2. That unless the defendant acted as secretary of the company, in New York, at that time, the plaintiff could not recover. This made the time material, but was intended to have the court decide that as the complaint alleged that the defendant acted as *secretary* of the company, and while so acting issued the policy, the proof of his acting as secretary in New York was essential. The complaint would be complete if it omitted the description of the office of the defendant, and merely alleged that he issued the policy in this city for the company. The same answer may be made to the 3d request.

4. That unless the policy was issued *by the defendant* for a premium paid to him by Kendrick in New York, in Sept. 1851, the plaintiffs could not recover. This made the time material, and assumed that the defendant, if in New York, could not act by his partner or agent in New York.

5. That if the defendant was not a *resident* agent in the city of New York he was not liable. There is no such term as resident in the act. The word *situated*, as applied to agent in section 9, refers to the place where the agent is when he does the business or act complained of—the place which he makes his office for that business.

6. That unless the company had an *agency* in the city of New York, the plaintiffs could not recover. It was enough if the defendant acted as agent of the company, although the company had no person avowing himself the agent of the company, or no place belonging to it. This last would be the meaning of the terms used—an "agency" of the company.

7. That signing a policy in Philadelphia and sending it to the applicant, or the attorney of the applicant, in New York, is not a violation of the act of 1851. This probably was the question on which the case turned. The judge read the section of the act, and told the jury it was for them to decide whether the defendant had acted *in this state* in issuing the policy to Kendrick. This seems to have been a compliance with the plaintiffs' request to charge. But a majority of the court is of opinion that it was so indefinite that it left the jury under a mistake, when they ought to have been specially instructed as to the law, and allowed them to infer that if the defendant had no connection with Fisk, and issued the policy in Philadelphia, and in good faith sent it on from there to Kendrick or to Fisk, supposing Fisk to be the attorney of Kendrick and not the agent of the company, still the defendant would be liable, on the idea that his sending the policy to New York was acting here. The jury may possibly have been so misled, as the counsel for the plaintiff, at the trial, (as he did also on the argument at general term,) insisted that the last view of the law was correct, and that the defendant was liable although all he did was done in Philadelphia, if he sent on the policy from that city to this. There are cases in which one sending a letter or other instrument from another state into this state would be liable to the criminal law of this state. But these are not cases in which our law recognizes the act as lawful and valid if done in another

state, and only aims at its prohibition in this state. The act of 1851 does not mean or attempt to prevent an insurance company in Philadelphia from insuring our citizens; nor does it punish an agent of those companies for acting for them if he acts out of this state. It uses a marked and peculiar precaution in the choice of language to show its intent. It is, that "it shall not be lawful for any person to act *within this state* as agent or otherwise, in receiving applications for insurance, and to aid in transacting the insurance business of any company not incorporated under the laws of this state, until" &c. In most prohibitions of unlawful acts the prohibition is expressed in general terms; leaving to inference the intendment that the punishment is only intended for acts done in this state; but here the prohibition is expressly limited to acting *within this state* as agent; because the law only intended the prohibition when the actual agency was in this state, and the thing done was actually done in this state. It meant to allow our citizens to go to Philadelphia and get their policies effected there and mailed afterwards here. The evil was, acting as agent here, or effecting the insurance here. The latter was not done here, when the contract was completed in Philadelphia and was only mailed to this state. As soon as the proposal was accepted by the company, and the policy deposited in the mail, the contract was binding. After that, the forwarding of it to this place (if there were no agency here) was not procuring applications for insurance here, or aiding in the transaction of insurance business here; nor would its delivery here in such case, by one acting not for the company but for the applicant, constitute either of those prohibited acts. The act does not prohibit any of our citizens from applying for insurance to a foreign company on their own account; nor from doing so by an attorney of such citizen; nor from receiving the policy here, by mail, when effected abroad; nor, as a consequence, from so receiving it here through the attorney of such citizen; but it does prevent the agent of the company making such delivery; for that would be to "aid" in transacting the insurance business of such company. For this exception there must be a new trial; the costs to abide the event

This last exception would be the only one necessary to decide. were it not that there are several other actions pending, under this law, and the decision of the court was desired as to all the points, so as to be a guide in the trial of those cases.

The 8th request was, to charge that it is not a violation of the act for a person in New York to act as attorney for an *applicant* to a foreign insurance company. The opinions before expressed are in favor of this proposition, provided the jury are satisfied that the person acting was in good faith acting only as the attorney of the applicant, and not as the agent of the company under cover of an attorneyship for the applicant. This was probably what was meant by the judge at the circuit.

The 9th request was that if the policy was signed by the defendant in Philadelphia, and there mailed to Fisk in New York, and when mailed was beyond the reach of the defendant, he is not liable. This would exempt the defendant even if the jury should conclude that the defendant was acting in concert with Fisk, or through Fisk as his agent. It was too broad, and it would have been wrong to have so charged.

It was argued that the act was in violation of the article of the constitution of the United States by which the citizens of each state are entitled to all privileges and immunities of citizens in the several states. An incorporated company is not a citizen, within the meaning of this section, (sec. 1, art. 1.) Such a company is a creation of the state which incorporates it, which has no power to legislate for other states, or to give to the artificial bodies which it creates powers to act in other states. Such companies act in other states than those which incorporate them, only by the comity of such other states. The act takes from no citizen of Pennsylvania any privilege which it allows to a citizen of New York. Neither can act as agent in the cases prohibited by the law. The 9th section of the act declares how the penalty shall be sued for, and then adds that in case of non-payment, the party offending shall be liable to imprisonment for a period not exceeding six months, in the discretion of any court having cognizance thereof. This latter clause seems to imply either that the non-payment would sub-

ject the offender to an indictment, in any court having cognizance of such offences, or to a *ca. sa.* in the suit in which the penalty might be recovered. The law, in either view of it, would be consistent with our state constitution.

For the single reason previously given, a new trial is granted; costs to abide the event.

[New York General Term, May 7, 1855. *Mitchell*, *Clerke* and *Cowles*, Justices.]

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THE PEOPLE, *ex rel.* The Mutual Life Insurance Company of New York, *vs.* THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF NEW YORK.

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16a 424

Mutual Life Insurance Companies, incorporated previous to the year 1849, are liable to taxation upon their accumulations, as capital.

And where a company of that description having a fund, employed in its business, amounting to nearly three millions of dollars, was taxed by the assessors upon only $100,000, of personal property, *it was held* that the tax commissioners, on reviewing the assessment roll, had the power to add $900,000 thereto, making the amount of personal property belonging to the company, liable to taxation, one million of dollars, and that the board of supervisors was right in refusing to restore the original assessment, and in confirming the judgment of the commissioners.

A judgment, entered at a special term, denying an application for a *mandamus*, to compel the board of supervisors to restore or reduce the assessment to the sum of $100,000, and to apportion or fix the tax upon that amount, instead of one million of dollars, and to correct the tax accordingly, was therefore affirmed.

APPEAL, by the relators, from a judgment entered at a special term, denying their application for a mandamus. The opinions below contain a full statement of the facts. The following opinion was given, on deciding the motion at the special term:

"MITCHELL, J. Most, if not all, of our moneyed corporations had formerly a fixed capital, the amount of which was specified

in their charter. When, therefore, the revised statutes in 1830 directed taxation to be on the capital of moneyed corporations, it was this certain fixed capital which was intended, so far as corporations having such capital were concerned; and it was accordingly held that the taxation should be on that capital alone, and on the whole of it, whether they had reserved funds exceeding that capital, or had sustained losses which would reduce it. But more recently, mutual companies have arisen without a fixed capital, but with funds reserved as sacredly and avowedly as the capital of the old companies, as security for those who would deal with them. These mutual companies, with an excusable anxiety for their own interest alone, strongly urged that they had no capital, and so were not liable to any taxation. This court decided that the reserved funds thus set apart were their capital, and that they were to be taxed on the amount of those funds. In 1849, (Apl. 10, ch. 308,) the legislature by a general law authorized the formation of mutual companies for various purposes, including life and health insurance; but required that no joint-stock company, authorized under that act, should do business in the city of New York, or county of Kings, with a less capital than $150,000, and that no marine or fire insurance company should commence business in the city of New York or county of Kings until it had premiums from at least 100 applicants, amounting to $300,000 in case of marine companies, and $200,000 in case of fire companies; and that in other parts of the state the premiums to be paid or secured should amount to $100,000, and that no company for life or health insurance on the mutual plan should commence business until a cash capital of $100,000 should be paid in and invested.

On 29th June, 1853, an act was passed, (ch. 469,) to take effect in twenty days thereafter, that any mutual life insurance company incorporated previous to the act of 10th April, 1849, should be subject to taxation in the same manner as if it were incorporated under said general law with a capital of $100,000, as required by the sixth section of the general law. To take the view of this law most favorable to the relators, this act was

intended to make these companies liable to taxation in the same manner as if they had a fixed capital of $100,000. Under the decisions before referred to, and the statutes up to the last date, such a company would be liable to taxation on that amount, although its capital should in fact be reduced to a much smaller amount, and would not be liable to taxation on any larger amount, although it should have reserved funds far exceeding that amount. But on the 21st of July in the same year, by an act passed on that day, and which took effect immediately, the legislature changed this rule—so changed it as to leave the law as it stood before, when the capital of a company was reduced, unless its clear annual income was equal to five per cent of the capital, but changed it when the company had surplus profits or reserved funds beyond its capital; and declared that its capital, together with those surplus profits or reserved funds, (except ten per cent of its capital and except its real estate,) "should be assessed and taxed in the same manner as the other personal and real estate of the company, unless such company shall be entitled to commute," and shall elect to do so. (§ 10 *of* 1 *R. S.* 415, *as amended by an act of* 1853.)

This act was passed to amend the general law contained in the revised statutes as to taxation, and applies in its terms to "every company liable to taxation," (§ 10 as amended,) or when restricted by the revised statutes, to "all moneyed or stock corporations" deriving an income or profit from their capital or otherwise. (1 *R. S.* 414, § 1.) It has been decided that these companies come within that description. The effect of this act was, that (while before companies with a fixed capital could be taxed only on their capital, although they had large surplus profits and reserved funds) after this act was passed those companies would be taxed, both on their capital and on those surplus profits or reserved funds. Such has been its practical operation; and banks and other companies, which before had held their surplus profits exempt from taxation, have since been compelled to pay taxes on them. These companies can claim no special exemption in their favor; they are within the words of the act, and within its spirit. The object of the act was to in-

crease the taxable property in the state, and to raise more money by taxation; and it was part of the same policy which led to the passage of another act on the same 21st July, 1853, (ch. 651,) imposing an additional state tax of $\frac{3}{4}$ of a mill for the fiscal year commencing October, 1853, and of $\frac{1}{2}$ of a mill for the year commencing October 1, 1854. The state needed more revenue, and this was discovered by the 21st of July of that year, and both these measures were resorted to in order to supply that need. This, too, explains why the act of 21st July should be so drawn as to qualify an act passed so short a time before as the previous 29th of June. The public faith required the payment of the public debts, and those whose business it was to point out the ways and means of doing this, discovered the necessity of resorting to these measures when they were adopted, and probably did not long before.

It was urged that these companies could not be intended to be included in the act of 21st July, because that act allows companies which do not receive in any year a clear income of five per cent on their capital to commute, on paying five per cent on their clear income. This act is only an amendment of 1 *R. S.* 414, &c., so that it is to be read as part of the revised statutes; and then it might as well be urged that the company was not liable to any part of the chapter of the revised statutes as to taxation, and so that the company was exempt from all taxation. This ninth section gives the special privilege of commuting to those who can bring themselves within its provisions; but to those who cannot, it is as if it were not in the law. If the relators' construction of the act of June 29th, 1853, is so far correct that they are to be taxed as if they had a capital of $100,000, then their profits are to be calculated on that sum, for the purpose of ascertaining whether they can commute or not, and then they can come within that section, if their profits are not too great. The memorial of the relators to the legislature in 1853, submitted in this case, states that "a single life insurance company in this city had, on the 1st May, 1853, a reserved fund of $2,500,000, which must accumulate to many millions to meet at maturity the claims on policies now in force." Is it

not likely that this disclosure led to the act of July 21st, taxing reserved funds of all companies, and forcing the legislature, if it would tax all property not devoted to charitable or religious purposes, not to leave these newly discovered treasures any longer exempt? And if—as the memorial supposes—this fund must increase to many millions in the hands of single companies, there may be some reason to apprehend that these companies would divert from their ordinary channels such large sums that trade would be embarrassed, and the companies obtain a control not very favorable to the simplicity which should characterize our institutions? These considerations certainly would not make these companies such favorites with the legislature as to exempt them from taxation, which the widow and the orphan, who have any property, must bear.

The assessors assessed this company at $100,000, supposing that, under the law, they could not assess any more of their property; but they did not make that the estimate of the value of the property. The tax commissioners ascertained this fact, and that the reserved funds of the company exceeded $1,000,000, and assessed the company at that last sum. The company appealed to them, and to the supervisors of the county, to restore the rolls to their former condition; but both bodies refused, and the company now applies to the court for a mandamus to compel the supervisors to make the restoration. The powers of the tax commissioners were considered in the case of Adriance *vs.* these same defendants, and it was held that the tax commissioners could not raise the valuation of real estate above the actual valuation placed upon it by the assessors; because they had power only to add to the roll, and assess, according to law, any real or personal estate liable to taxation which had not been assessed by the assessors, (*Laws* 1850, *ch.* 121, § 21, *amended* 1851;) and that real estate once valued by the assessors was assessed by them, although assessed below its real value. But in this case the assessors did not determine the value of the relator's personal estate at all; but, acting under a mistake of the law, they omitted to assess its value, and placed in the roll, not its value, but a sum which they supposed the law required them

to put there without any exercise of their judgment. Under the act of July 21, 1853, they were to place in the fourth column of the assessor's roll "the amount of the capital stock of the company, and of all its surplus profits, or reserved funds, aforesaid." (§ 3.) The assessors did insert in the column the nominal capital, but omitted the surplus profits, or reserved funds, which the law made liable to taxation. These profits or funds were personal estate, liable to taxation, which had not been assessed by the assessors, and so were not within the jurisdiction of the tax commissioners to "assess according to law," and to "add to the assessment roll." (*Laws of* 1850, *Ch.* 121, § 21.)

The motion for a mandamus is denied, with $10 costs; but to enable the relators to carry the question further, they may have an alternative mandamus, stating all the facts contained in these papers on which this motion is founded, so that the defendants may demur thereto, and let an order be entered denying a peremptory mandamus; and proceedings may be stayed on the execution until the decision of the general term."

*J. Blunt*, for the appellants.

*By the Court*, ROOSEVELT, J. This is a claim on the part of one of only two particular mutual life insurance companies, for the law, although seemingly general, applies to no others, to be in effect exempt from taxation. With a fund employed in their business amounting, as appears, to nearly three millions, they claim that by an act of the legislature, passed, we may presume, at their special instance, in June, 1853, they were to be taxed as if their capital was limited to the comparatively insignificant sum of $100,000.

By the act referred to it was provided that any mutual life insurance company, incorporated before the adoption of the general insurance law of 1849, should be subject to taxation in the same manner as if it were incorporated under the general law with a capital of $100,000. Construing this act in connection with the previous legislation of the state, and harmonizing as far as practicable with the principles of equal justice, the courts,

and as I conceive very properly, held that the specially chartered companies created under the old monopoly system, were to be placed upon the same footing—and no better—as those organized under the general law: which, instead of limiting the taxation of the new associations to $100,000, merely limited their power to commence business until they had on hand a fund of at least $100,000.

The $100,000 provision, it was held, had the same meaning both in the act of 1853, and in the general act of 1849, to which that of 1853 referred—and in the act of 1849 its object confessedly and indisputably was to fix a minimum instead of a maximum—a minimum of capital and not a maximum of taxation.

The act of June, 1853, was no doubt adroitly framed in the interest of the two companies in question. Its language, without being direct and striking, was, upon close consideration, susceptible of, if it did not grammatically require, the interpretation subsequently sought to be put upon it. Having failed, however, as we have seen in the courts, to establish that interpretation, another attempt, it would seem, by or on behalf of the companies, was made upon the legislative department in the form of a quasi appeal from the judiciary; and in March, 1855, an act was accordingly passed by the legislature of that year to declare the true intent and meaning of their predecessors in the act of June, 1853; in other words, an act of the legislature to reverse the act of the court. The relators, however, are now met by a new difficulty. Before the act of June, 1853, went into operation, the legislature, it appears, overlooking, we may presume, what they had less than twenty days previously done—not an uncommon occurrence in the closing scenes of a legislative session—passed a new tax law applicable to all incorporated companies, chartered or general, liable to taxation, "on their capital or otherwise." By this act not only the capital stock proper of all such companies, but their "surplus profits or reserved funds exceeding 10 per cent," were expressly directed to be assessed and taxed in the same manner as the other personal or real estate of the county. Here, then, be the construction of the act of June what it may, was a palpable repeal in July of its only

provision, and a substitution of a more comprehensive enactment in its place—a circumstance wholly overlooked, it would seem, by the authors of the declaratory act of 1855. That act, declaring, as it did, "the true intent and meaning" of the act of June, 1853, and of that act only, merely directing what construction should be given by the courts to an act which, in effect, had long since been repealed, and left the general law of July, 1853, untouched, to be applied to "every company" alike, whether organized under the old system of special charters, or the new system of free trade. And why should any distinction be made between them? Especially, why should the two particular companies in question be taxed only on $100,000 each, while every other company in the same city, and standing on the same footing, is assessed on its "reserved funds?" The constitutionality of such legislation—even if expressly intended and clearly expressed—might well be doubted. But the court will not presume that the legislature intended to violate either the spirit or letter of the constitution, and will not, therefore, give to their acts a construction which would imply such intention. Equality of taxation is a fundamental principle of our government, which no legislature, in the absence of the most explicit provisions, will be presumed to have intended to violate. The assessors, it seems, in the case of the present company, misled by the peculiar wording of the act of June, 1853, taxed them only on $100,000. But the tax commissioners, on reviewing the assessment roll, added $900,000, making the amount one million instead of one hundred thousand; and the board of supervisors subsequently, on the application of the company, refused to restore the original assessment, and confirmed the judgment of the commissioners; upon which the company sued out a *mandamus* to compel the supervisors to reverse their action in the matter; and the case now comes up on a demurrer to the answer of the supervisors; or rather, on an appeal to the general term of the court from the decision of the judge at special term, sustaining the supervisors.

What, then, we are to inquire, are the powers of the tax commissioners? Can they, in such cases, correct the errors of the

ward assessors? They have power, it is said, to add to the assessment roll and assess any real or personal estate, liable to taxation, which may not have been assessed, but they cannot increase the valuation as made by the assessors. As to real estate, which is always specific, the rule may be so. Where the local officers, after inspecting a particular house and lot, put upon it a certain value, there may be some reason, though none of a very striking character, for not permitting the commissioners to raise such value. But what reason is there for such a restriction in the case of personalty? The assessors, in estimating the taxpayers' personal property, do not value any particular stock of goods, or household furniture, or bonds and mortgages, but personal estate generally. When, therefore, in such cases, they put the amount too low, it is invariably, almost, an error not of undervaluation but of omission. And it is conceded the power of the tax commissioners, however limited in other respects, extends at all events to supplying the omissions of the ward officers, whether the property omitted be personal or real. Now the supervisors in their answer allege—and the allegation is admitted by the demurrer—that in the assessment of the personal property of this company, there was an omission, among other items, of $2,343,681 in bonds and mortgages, which were "part of the capital, surplus profits, or reserved fund of the company," and which the assessors did not set down or estimate, in consequence of the erroneous impression they labored under, not as to the value of these securities, but as to the law of the state, applicable to them. They mistook the law, and under that mistake, inserted only the nominal capital of $100,000. In other words, they omitted the "surplus reserved fund:" they omitted it altogether. Was it not then both the right and the duty of the commissioners to supply the omission? The only error of the commissioners, as it seems to me, an error, however, of which the relators have no reason to complain, was, not in adding, but in adding too little, in adding less than one million, instead of more than two.

It has been said that if the commissioners are allowed to possess this power of raising the amounts set down by the assess-

ors, great injustice may at times be done to particular individuals, as no provision is made by law for giving notice of the contemplated augmentation. And does not this objection apply with equal force to the addition of an omitted house, as to the addition of an omitted mortgage? Suppose a case in which the assessors should have omitted wholly the personal estate of a particular individual; may not the commissioners insert it? Even the counsel of the company at first conceded that in such a case the commissioners might insert the personalty so omitted. And yet the argument, from want of a notice, is the same in both instances. All that can be said properly on this point is that the statute is defective, and that the defect, although remedied in actual practice by the commissioners, should be corrected as matter of right, by the legislature.

The relators, it appears, had notice. They argued before the commissioners, and they appealed to the supervisors. They were heard by both, and were not considered as wronged by either. And such, too, after full hearing, was the opinion of the special term.

There is clearly no equity in the relators' case. They seek to establish for themselves a special privilege, at the expense of the rest of the community, and incompatible with the equal rights of all other companies, but one, engaged in the same business. Such claims, to be available, must be clearly made out; and statutes passed to sustain them (if so passed at all) being at variance with common right, are to be strictly construed. So construing the statutes cited by the relators, the position taken by them is as untenable in law as in equity.

Judgment of special term affirmed, with costs.

[New York General Term, May 7, 1855. *Roosevelt, Clerke* and *Cowles*, Justices.]

## WHITE *vs.* BULLOCK.

It is a matter within the jurisdiction of the surrogate on the final settlement of an estate, to find what each executor is debited and credited for; also what they have received and paid out jointly; in order that he may determine what each is liable for.

Where there are two executors of an estate, one active and the other inactive, the latter will not be held accountable for the acts of the former, if he has reason to believe that his co-executor is acting prudently, and according to law. The surrogate is therefore bound to inquire whether one or both are accountable.

And the decree made by him, upon such accounting is conclusive, between the executors, as to the amounts received and paid out by each, and cannot be contradicted by the sworn accounts of the executors, produced by them upon the accounting.

Commissions are to be divided between executors according to the services rendered by them respectively; and in the absence of any other proof in respect to such services, the share of each is to be determined by the amount of moneys stated in the surrogate's decree to have been received and paid out by the executors, respectively.

Justice requires that when an executor has done nothing, and has borne no responsibility, he shall not share in the commissions.

The act of 1849, (*Laws of* 1849, *ch.* 160,) is in accordance with this principle.

It *requires* the surrogate to apportion the commissions among the executors according to the services rendered by them, respectively.

APPEAL, by the plaintiff, from a judgment entered at a special term. The plaintiff and the defendant were the executors of John M. Mounsey, deceased. The plaintiff sued for one half of the commissions allowed by the surrogate on the final settlement of the accounts of the executors; he contending that he was entitled to one equal half of the commissions, and the defendant insisting that he had incurred no responsibility and rendered no services, except in a joint liability for $121, and so was entitled to commissions only on that sum. The plaintiff produced the decree of the surrogate, on the final accounting of the executors. That expressly declared that the executors were debited with $121, *the inventoried effects of the personal estate*, and that they were allowed $121 by payments towards *funeral expenses*. This sum was charged and credited to *both* executors. It also declared that the residue of the

moneys received, amounting to $10,233.59, except the above $121, were *received* by, and *debited to, Robert Bullock alone and not jointly* by him and Charles L. White, his co-executor. The items of that residue showed that the moneys were received by the defendant alone, for rents, and the proceeds of the sales of real estate since March 1, 1841, the date of the death of the testator, and from the estate of J. M. Todd, of whom Bullock was a surviving partner. The decree also declared that the payments made, except the $121, and which with the deduction of that sum, amounted to $4656.67 "were paid by and *are* credited to Robert Bullock alone, *and not jointly by him* and Charles L. White his co-executor;" and then striking a balance it declared the total cash in hand to be $5807.78 which it declared to be in the hands of *Robert Bullock*. It afterwards, reciting that the amount in the hands of Robert Bullock, *one* of said executors, was $5807.78, ordered that *he* pay, out of this sum, various sums, covering, with the commissions, the whole $5807.78 in the hands of this defendant. The directions as to commissions were that he retain the commissions of said executors, being the sum of $202,33.

The plaintiff then offered in evidence a certified copy of the accounts, showing receipts and disbursements by White and Bullock as executors of Mounsey, and on which the surrogate's decree was founded, in order to show thereby what *each* executor received and what *each* paid out on account of the estate, and thus to show what commissions the plaintiff was entitled to. The judge rejected the evidence, and the defendant excepted. These accounts were sworn to by both executors; each swearing that they were just and true and contained a true account of all moneys received *by him* as executor. The accounts contained a number of schedules, and several of them were headed "schedules of moneys from, &c. by Robert Bullock and Charles L. White executors." These accounts were a part only of the evidence before the surrogate; for notwithstanding their production before him, he found precisely what each executor received, and what each paid out, and what each was

debited and credited for; and what the two together received and paid out and were debited and credited for.

The cause was tried at the New York circuit in June, 1854, before Justice MITCHELL and a jury, and a verdict was rendered in favor of the plaintiff for $3.03 damages; and in favor of the defendant, for the costs.

*A. Thompson*, for the appellant. I. The exclusion of the executors' sworn account by the judge as testimony was erroneous. It was competent evidence, and should have been admitted.

The surrogate's decree was not conclusive as between the executors. A surrogate's decree is only conclusive, on the final accounting, of the following facts, and no others. (2 *R. S.* 93, § 65. *Pres. Bank of Poughkeepsie* v. *Hasbrouck*, 2 *Seld.* 216, 221.) (1.) That the charges in the accounts for payment to creditors, legatees, next of kin and for necessary expenses are correct. (2.) That the executor or administrator has been charged with all the interest with which he is chargeable upon such moneys received by him as are embraced in his account. (3.) That the moneys stated in the account as collected were all the moneys collectable at the time of the settlement, on the debts stated in the account. (4.) That the allowance for decrease, and the charge for increase, in the value of any assets, made in the account were correctly made. (2 *R. S.* 93, § [illegible] *statute* 1847. *Pres. Bank of Poughkeepsie* v. *Hasbrouck*, 2 *Seld.* 216, 221.) (5.) The plaintiff, as executor, had no right to appeal from the surrogate's decree for not stating how the commissions due the executors should be divided between them. (6.) It is clear, then, that in this action, if the decree was not conclusive, the evidence offered by the plaintiff was improperly excluded on the trial.

II. The judge erroneously refused to charge that the plaintiff was entitled to one half of the commissions, $202.33, named in the surrogate's decree, with interest from May 5th, 1847. (1.) The commissions are called or denominated in the decree the commissions of the *executors*, which the defendant is per-

mitted by the decree to retain. (2.) The presumption cannot arise that the commissions belonged to one of the executors, when they are called the commissions of the executors—simply because in paying the money in his hands he is permitted to retain them. (3.) The burden of proof on the face of the decree lay upon the defendant, to show that he was entitled to the whole of the commissions. (4.) According to the law, the commissions belonged to the executors jointly and in equal proportions, and even the surrogate had no right to divide them. The surrogate *now* has the right. (2 *R. S.* 93, § 58, *amended by Laws N. Y.* 1849, *ch.* 160, § 1, *p.* 218, 219.) (5.) If the surrogate could have made a difference between the executors, he did not do it, and in such case the presumption of law would be that the commissions should be equally divided. (6.) The surrogate's court is a statutory jurisdiction, and has no common law or other powers, except those conferred by statute. (*Dakin* v. *Hudson*, 6 *Cowen*, 221. *Bloom* v. *Burdick*, 1 *Hill*, 130. *Corwin* v. *Merritt*, 3 *Barb.* 341. *People* v. *Barnes*, 12 *Wend.* 482. *Dakin* v. *Demming*, 6 *Paige*, 95.)

III. The judge's charge was erroneous in holding that the surrogate's decree not having passed on the amount of the commissions to both executors, the amount must be divided between them in proportion to the services rendered by each executor. (1.) This charge is clearly inconsistent with the decision that the sworn account of the executors could not be given in evidence, to show what services each executor rendered in the administration of the estate. (2.) It is clear the judge held the surrogate's decree conclusive, both as to the amount of the commissions and as to the services rendered by them respectively. This is erroneous. (2 *Selden*, 216, 221.) (3.) It is also perfectly evident that the decree did not intend to settle the rights between the executors. (4.) The decree cannot legitimately have any such effect given to it.

IV. The judge's charge was incorrect, in stating to the jury that the plaintiff, as co-executor, was not equally responsible with the defendant for all sums of money received by the defendant, for the estate. (2 *Wms. on Ex'rs*, 1119, 1120.)

V. The judge should, as requested, have charged the jury that an executor was always accountable for money received by his co-executor, if he aids or assents to it being received by the co-executor, or if it be in his *power to prevent him from receiving it.*

*J. N. Platt*, for the defendant. I. The great point in the case is, whether White, who did nothing over and above being engaged with Bullock in receiving and paying 121 dollars, is to receive one half of the commissions on what Bullock received and paid over, without having expended any labor thereon, or incurred any liability therefor, or received or paid over any part of it. The judge decided this point correctly when he charged "that amount must be divided between them in proportion to the services rendered by each executor." This charge was too much in favor of the plaintiff, because the surrogate, by his decree, had decreed that Mr. Bullock should retain these commissions. But laying this decree out of view, the judge was right in his law, and he is supported by the following cases: The statute (2 *R. S. p.* 93, § 58) provides for the executor's commissions—not for services or responsibilities, but for *moneys received and paid over*, whatever may be the equities or justice of the case, or the labors of the executors; he or they receive nothing but for moneys passing through their hands. Let us examine the law on this subject. The revised statutes do not create the right to commissions, they merely put the law in a legislative form. *Laws of* 1817. *p.* 292, directed the chancellor to fix the rate. 3 *John. Ch. p.* 630, fixes the rate. 2 *R. S. p.* 9, § 58 adopts it. (*Grant* v. *Pride*, 1 *Dev. Eq.* 269. 2 *Barb. Ch. Rep.* 438. *Dayton's Surrogate, p.* 227.)

II. With the exception of the 121 dollars, all the business was done by, and all the moneys were received and paid over by the defendant. The decree says all the assets are chargeable to R. Bullock, and are $10,233.59. All payments were made by him, and are $4,777.67, leaving him chargeable with $5,807.78, out

of which he is directed *to retain* the executor's commissions and pay various creditors, including himself.

III. The judge was correct in ruling out the petition. The decree, which was final, adjudicated the rights of the parties, and the object of introducing the petition is to contradict the decree, and therefore clearly inadmissible. But on examination the petition does not contradict the decree, and is entirely consistent with it. It is a joint accounting, but neither meant to charge the other with more than he or she had received.

IV. The judge's charge is correct, and is too broadly in favor of plaintiff, as the plaintiff was only entitled to commissions on moneys which had passed through his hands; he was entitled to nothing for personal or other services.

V. The exception at folio 150, to that part of the charge in which the judge stated that the plaintiff was not equally responsible with the defendant, for all sums of money received by the latter for the estate, merely from his being a co-executor, is bad, as by the case of *Bogert* v. *Hertell*, (4 *Hill*, 492,) and is irrelevant to the issue.

VI. The exception at folio 151, to the refusal to charge that an executor is always accountable for moneys received by his co-executor, if he aids or assents to its being received by him, or it is in his power to prevent his co-executor receiving it, was manifestly too broad, and it is immaterial to the case and facts.

*By the Court*, MITCHELL P. J. The finding as to the receipts and payments of the executors was a matter within the jurisdiction of the surrogate on the final settlement of the accounts; for he was to determine how much *each* executor was liable for. If one executor had received all the moneys and made all the payments, and the other had every reason to believe that the active executor was doing all this prudently and according to law, the inactive one would not be accountable for the moneys thus received by his co-executor. The surrogate was therefore bound to ascertain how these facts were, before he could decide whether his decree should be that Bullock

alone should be accountable for the balance which was found in his hands, and should pay the same, or that he and White were both accountable for it, and should pay it. He did pass on the question, and declared that White was accountable with his co-executor for the $121 alone, and that no debt was discharged by the payment of funeral expenses, and that the rest of the moneys were "*received by* and debited to R. Bullock alone, and not jointly by him and C. L. White, his co-executor." The negation "not jointly by him and C. L. White his co-executor," was added to prevent any doubt as to the extent of the acts of each, and of the liability of each. The decree in conformity with this makes Bullock alone liable for the money thus received. The plaintiff receives the benefit of this decree—is exonerated from liability to the creditors for any part of the moneys thus charged to Bullock, and which may still be a valuable immunity to him (if, as intimated, Bullock has failed to pay all the creditors) and acquiesced in the decree, and *founds this very claim upon it*, and still seeks to disprove the most important parts of it. This is as unjust as it is contrary to legal principle. If the decree is not conclusive between these parties as to the amounts received and paid by each; then the defendant may turn around and sue the plaintiff for half of the $5807.78 with which he is charged, and produce these verified accounts, according to his views, as an admission by White that he had received half of the money. But the accounts, if admissible as evidence, would not establish the facts for which they were offered. The two executors were together to render accounts of all moneys received by both or either of them. In making out the accounts, no question being *then* raised as to the extent of the separate or joint liability of each executor, the accountant might well entitle them schedules of moneys received by Robert Bullock and C. L. White, executors; for then the *main* thing was to show what moneys were received for the *estate* and paid out for the estate, and not how far each executor was liable, and he would regard the executors and the estate as synonymous. Each executor would also swear that the schedules contained a true account of all moneys paid and

received by him, and so far only did he verify it. If they contained all that he received and all that he paid out, although they contained much that he never received but which his co-executor received, and much that he never paid out, but which his co-executor paid out, his affidavit was true that they were a true account of all moneys paid and received by him. He did not swear that the accounts were true as to the persons by whom they were received. The schedules contain the items of the moneys received and paid out by Bullock as surviving partner of Mounsey & Co., and entitle those as "rec'd by R. Bullock, surviving partner," and do not there mention White. The reason of this is that the *executors* would be accountable for the net balance only to which Mounsey's estate was entitled as his share in the partnership property, after paying all debts, and therefore in the accounts containing the items from which that net balance was derived it was stated as received by R. Bullock as surviving partner, and not by him and White as executors.

The plaintiff's counsel then requested the judge to charge the jury that the plaintiff was entitled to one half of the commissions; and that the parties could not go back of the surrogate's decree, to ascertain the services rendered by each. The judge refused. If the latter part of this proposition was correct, then the plaintiff had no right to prove the accounts verified by the executors, for in that he would go back of the decree. Next he requested the judge to charge that if any difference should have been made in the commissions to be received by the executors, such difference could have been made in the decree only. The judge charged, (1st) that the commissions were to be divided between the executors according to the services rendered by them; and that without other proof of those services it was to be determined by the amount stated in the decree to have been received and paid by them respectively; (2d.) That if it had been proved that the plaintiff had rendered services in aid of the receipt and payment of the $5807.78 received by Bullock, or had become jointly liable with him for that amount, or for part of it, he would have been entitled to a fair compensation for that service; (3d.) That the

plaintiff was not responsible with the defendant for all moneys received by the defendant for the estate, merely from being a co-executor; and (4th.) That there was no proof that he had done any act to make himself responsible, except as to the $121, and that the surrogate did not hold him responsible except as to that sum. The judge refused to charge, (5th.) That an executor is always accountable for money received by his co-executor if he aids or assents to its being received by his co-executor, or it is in his power to prevent the executor receiving it; declaring the proposition too broad.

The last proposition is evidently too broad; for it would make an executor liable, in case he had it in his power to prevent the executor receiving money, if he did not prevent it, although he should have no reason to believe that the executor was not acting in good faith in receiving it, and would not faithfully keep it for the estate. Besides, there were no facts to raise the question. The objection to the 3d branch of the judge's charge was also too broad, and like the last. The 2d branch was favorable to the defendant, if there had been any facts to sustain it. The 4th branch was a statement as to the proofs, and was true.

The authority quoted by the plaintiff (if any were needed) shows that if an executor is merely passive he is not responsible for the acts of his co-executor, and that he cannot be made chargeable for a *devastavit* of his co-executor, unless he in some way contribute to it. (2 *Wms. on Executors*, 1530.) Justice would require that when he has done nothing, and has borne no responsibility, he should not share in the commissions. The act of 1849, ch. 160, is in accordance with this principle. It *requires* the surrogate to apportion the commissions among the executors according to the services rendered by them respectively. It did not introduce a new principle, but gave to the surrogate an express power and obligation to apportion the commissions, because before that, no such *express* power was possessed by *that officer*, and possibly no such implied power. In *Valentine* v. *Valentine*, (2 *Barb. Ch.* 438,) the chancellor said 'the whole commissions should be apportioned among all the

executors, either equally or upon some equitable principle in reference to their respective services *in* the administration of the estate." Did he not mean equally, when their services or liabilities were equal, or nearly so, or upon some other principle—in both cases having reference to their respective services? This would best comport with the views of an equity judge. The apportionment is not determined as in case of partnership, by positive agreement as to the shares of each, but by rules of equity. Those rules would never favor the one who neglected the estate, and give him a bounty out of the compensation earned by the other.

The judgment is affirmed, with costs to the defendant.

[New York General Term, May 7, 1855. *Mitchell, Clerke* and *Cowles* Justices.]

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## Hogan *vs.* De Peyster, administrator, &c.

A testator directed his real and personal estate to be converted into money, as soon as convenient, and the proceeds to be securely invested in the most productive manner; leaving it, however, to the *discretion* of his trustees to suffer such part of his personal estate as was then invested in bank stock to remain in that state, so long as they might *deem it most for the interest of the testator's family.* At the time of his death, in January, 1836, the testator held 1000 shares in the stock of the Bank of the United States. The charter of that bank expired March 4, 1836, and on the 18th of February, 1836, the state of Pennsylvania chartered "The United States Bank," an institution designed to take the place of the former; and by arrangement between the two banks the stock of the former national institution was transferred to the new bank. The new bank subsequently failed, involving nearly a total loss to the stockholders. *Held* that the administrator, *cum testamento annexo*, did not render himself liable for the loss upon the testator's stock, merely by *suffering* such stock *to remain* in the state it was in at the testator's death, and to pass, as the rest of the stock did, to the new bank; or by receiving the dividends upon the new stock.

IN EQUITY. This suit was originally commenced in the late court of chancery. The bill was filed to recover of

the defendant as administrator and trustee, the difference between what certain bank stock actually sold for, and what it *should have been sold for* by the defendant, in the performance of his duty as administrator *ad colligendum*, administrator with the will annexed, and as trustee.

John Clendenning died, leaving a will, and a large estate and family, and the defendant, Frederick De Peyster, was appointed, first, administrator *ad colligendum*, and afterwards administrator with the will annexed. He filed a bill for the construction of the will; and a decree adjudging its meaning, and appointing the defendant trustee, was made by the chancellor, and affirmed by the court of errors. A part of the testator's estate consisted of the stock of the Bank of the United States, which the defendant permitted to be converted, subsequently, on the expiration of the bank charter, into the stock of the United States Bank, chartered by the state of Pennsylvania, which stock, thus converted, became of comparatively little value, and was sold at low prices; and the plaintiffs here seek to recover the loss sustained on that part of the said stock which belonged to Mrs. Hogan and her children.

*L. R. Marsh*, for the plaintiffs. I. It was the duty of the defendant to have sold the stock of the National Bank, converted it into money, and brought it within the jurisdiction of the courts of this state, and invested it either in the public funds, or on the security of real estate; those being the two modes of investment of trust funds recognized and sanctioned by the courts. The general principle contended for in this point is well settled. (2 *Wms. on Ex'rs*, 1110, 1111. 1 *Mad.* 298. 5 *Ves.* 839. 5 *Pick.* 96. *Ackerman* v. *Emott*, 4 *Barb.* 626.)

II. But *when* should the defendant have sold this stock? The testator died 28th January, 1836. About ten months afterwards, 19th November, 1836, the defendant was appointed administrator *ad colligendum*, the charter of the national bank having expired in March preceding, (4th March, 1836.) His duty as such administrator, perhaps, did not call upon him to sell, but only to collect and keep safe. But, on the 4th of Feb-

ruary, 1837, the defendant was appointed administrator *cum testamento annexo.* (2 *R. S.* 72, § 22; *vol.* 2, *p.* 258, § 22, *4th ed. Conklin* v. *Egerton's Adm'r*, 21 *Wend.* 430; *S. C. on appeal*, 25 *id.* 224. 8 *Paige*, 310, 311.) In the opinion, in the case of the bill filed for a construction of this very will, the chancellor said, "The administrator with the will annexed is probably entitled to execute all the trusts of the will, in the same manner as if he had been named therein by the testator, as the executor and trustee." But inasmuch as there might be some doubt whether, as such administrator, he could convert the real estate into personalty, he provided, in that decree, for the defendant's appointment as such trustee. The chancellor, in 1840, in the case of *Egerton's Adm'r* v. *Conklin*, 25 *Wend.* 235, before cited, says, that in the above remark in 8 *Paige*, he referred "to the right of the administrator, with the will annexed, to execute the trusts of such will in relation to the real estate of the decedent." By the general law, therefore, applicable to administrators with the will annexed, (21 *Wend.* 433, and pages cited by *Cowen*,) and by the above statute, the defendant, on the 4th February, 1837, when he received the letters of administration *cum*, became, at least as far as regarded the personal estate of the decedent, vested with all the rights and powers, and subjected to all the duties and responsibilities of an executor and trustee. He was, therefore, unless otherwise excused, under the duty, immediately after Feb. 4, 1837, of selling the stock of this national bank, the charter of which had expired a year before. He is, therefore, we say, liable for the difference between its then or highest value afterwards, and the sum for which he subsequently actually sold it. This amount may be the subject of reference, if the principle is decided. Then, on 8th June, 1840, the final decree was made in the case commenced by the defendant, to obtain a construction of the will; and, as doubts had arisen as to the defendant's power as administrator *cum*, to convey real estate, he was then appointed trustee under the will. Now, if there could have been any doubt as to the defendant's duty as administrator *cum*, in reference to this bank stock, there could certainly be none, under his appointment as

trustee, on and after June 8, 1840. Besides, additional obligations were imposed on him, by the request of Mrs. Hogan to him to sell at different times. Now what are the defendant's alleged excuses or defenses? 1st. He says the testator, by his will, left it "to the discretion of my said trustees to suffer such part of my personal estate as is now invested in bank stock to remain in its present state so long as they may deem it most for the interest of my family." We answer: (1st.) That this was a discretion which the testator chose to bestow upon the three persons he had named as trustees. It was not a discretion that attached to the office of trustee, whoever should hold it. Besides, the obligation to sell, attached to the defendant as administrator *cum*, before his appointment as trustee. 2d. But this bank stock did not remain in the state in which it was at the testator's death, after the expiration of the charter of the national bank, and especially after it became converted into the stock of the state institution of Pennsylvania. The testator died 28th January, 1836, the will having been executed seven years before, to wit, 22d July, 1829. The words were really written in 1829, though they take their legal date and existence January 28, 1836. The charter of the bank expired March 4, 1836, and the defendant was appointed administrator *cum* 4th February thereafter. When he took this administration, therefore, that part of the testator's estate which was invested in the stock of this bank, was not in the same state it was in at the testator's death. Even, therefore, if the discretionary clause of the will applied to the defendant, in his character of administrator *cum*, yet he could derive no excuse from it for not selling the stock immediately upon receiving such letters, because of the great change which had taken place in the investment. The testator left it a productive stock of a living corporation. The defendant found the charter expired, and the corporation defunct. Not only this, but the testator left it invested in the stock of a national bank, and the defendant, as administrator, found it changed into the stock of a state bank, and allowed it to remain there. The testator left it in a sort of public funds, and the defendant permitted it to enter and remain in a private corporation. The defendant says

that the stock was specifically bequeathed by the will to the trustees named therein, in trust for the uses and purposes therein mentioned, and the defendant, as administrator, had no power to sell. (1.) These trustees renounced. The defendant was appointed administrator *cum*. This was with all the powers and obligations of such an administrator generally. He was then either trustee to carry out the will, which directs the conversion of all his estate, real and personal, into money and proceeds invested; or, as administrator *cum*, he was, in the exercise of the duties of that office, obliged to call in this investment. According to the defendant's doctrine, inasmuch as the whole estate was thus bequeathed, the administrator *cum* had nothing to do, and was a useless appurtenance. The chancellor, in the case before cited, says: "The administrator, with the will annexed, was probably entitled to execute all the trusts of the will, in the same manner as if he had been named therein by the testator as the executor and trustee." By the renunciation of the trustees, the estate did not vest in them; and all the duties of exercising diligence to secure the estate, required of executors and administrators generally, devolved upon the defendant when he was appointed administrator *cum*. (2.) If there were any force in this idea, advanced by the defendant, it altogether ceased when he was in point of fact appointed trustee in June, 1840. (3.) The defendant says, that he permitted it to remain invested as aforesaid, with the knolwedge, approbation and consent of the complainant, Wm. Hogan, who acted, as defendant believes, for himself and wife, and guardian of the other complainants. We reply: (1st.) There is no evidence of this—no proof, any where, that either Wm. Hogan, Sarah Hogan, or either of the plaintiffs, assented to the continuance of this investment in this stock. (2d.) But if there were any evidence of any assent of said William Hogan to the continuance of this investment, it would have no effect in excusing the defendant, or lightening his responsibility. The defendant was the administrator, and bound to do his duty. Wm. Hogan had no authority to assent for Mrs. Hogan, or the infant children. He was not general guardian of the children, but only *ad*

*litem* in the suit for construction of the will. The defendant says that the plaintiffs are barred from any recovery herein, by reason of his various accountings before the master. Now, the evidence on this subject is: The report of Master Codwise, which was merely on an order requiring him to divide and distribute the property in his, defendant's, hands, amongst the heirs. It had not the slightest connection with any liability the defendant might have theretofore been subjected to, by reason of any neglect of duty. The other accountings were merely of incomes. And the final accounting was also only of income. It was not an accounting of any damages to which the defendant might be liable for neglect of duty. That was not within the province of the master. It is not pretended that any thing was ever paid therefor. If he was ever liable, nothing was done on these accountings, to the adjudication, payment, or waiver of any such demand. They never went beyond the accounting for moneys actually received and paid out, or invested, or pretended to be invested, within the respective periods. They took no cognizance of the inventoried assets of the estate, or the value of stocks, or the liability of the administrator *cum*, or the trustee, growing out of omissions or commissions.

*Murray Hoffman*, for the defendant. I. It is conceded that the defendant had no power in the premises, so long as his character of administrator *ad colligendum* existed.

II. It was not in the power of the defendant, as administrator with the will annexed, to sell the stock. It was only when he was appointed trustee, under the decree of June 8th, 1840, that this power was acquired. In the opinion given by Mr. Hogan, October 21st, 1840 this is clearly and positively insisted upon.

III. But supposing that, as administrator, the defendant possessed ample power, he was fully justified in omitting to sell the stock, and holding the new stock in the state bank, as its substitute. (1.) It must be carefully noticed that he did not do *any act* to effect a change or substitution of the stock. All that he did was so far to recognize it, as to receive the dividends which

were paid. And these were divided, and paid away among the parties entitled to the income of the estate. (2.) The suffering a substitution of the stock was a justifiable and proper exercise of the discretion given to the trustees by the will, or necessarily vested in them by the law. The second clause of the will authorizes the trustees to suffer such part of his personal estate as was invested in bank stock to remain in its present state, so long as they should deem it for the interest of his family. It is matter of history, that the failure of the bank to obtain a recharter was known as matter of fact, and certainly before the testator's death. That identical stock could not be expected to remain in its then state. The testator had numerous parcels of stock of other banks. Hence this clause of the will is either wholly inapplicable, or it sanctions the continuation of an investment in bank stock at the trustees' discretion. But the plaintiffs in their points insist, that the discretionary power therein given, was vested in the three named trustees, and did not attach to any new trustee. Admitting this, it follows that the power did not vest, and the clause is not applicable to the defendant, as administrator with the will annexed. His duty and liability are to be determined upon general principles, irrespective of the clause, which did not apply either to him, or to stock situated as this stock was when he became such administrator. Was it, then, in the exercise of an honest discretion to leave the stock in the new bank? Most of the stockholders of the old bank took or retained the stock in the new. They became stockholders in the new bank without any action of their own, but by force of the act of Pennsylvania merely. The late Mr. Watts, described by the witness Kearney as a very shrewd man in stocks, retained the shares in the new bank. Prior to the suspension of specie payments, and from March to July 1836, the market value of the state bank stock was from 120 to 126. After the resumption in May, 1838, and from June to July, it was 120 to 123. In November, 1839, the defendant considered the investment in such stock good, on behalf of his son, who took some under Mr. Watts, and wished not to sell The continuance of the stock in the state bank, was with the

approbation of every one interested who was competent to assent or approve. They were aware of it; they received the dividends in the share of income which was divided among them, and allowed the defendant to pass his accounts before the surrogate, and before Master Codwise, without objection, protest or cavil. In October, 1839, a meeting of some of the parties in interest took place, when the propriety of selling the stock was discussed. One of the parties thought it ought to be sold. Mrs. Clendenning left it to defendant's best judgment. No one requested it to be sold. Mrs. Kearney states that she has heard the testator say he would not keep his stock if the charter was not renewed. This evidence was duly objected to, and clearly is inadmissible. But it is singular, indeed, that it was not communicated to the defendant, at that or some other meeting, as a strong inducement to operate upon him. The acts of the parties in 1840, after the decree of the court of chancery declaring the rights of the parties under the will, are of great importance. On the 27th of July, 1840, Mr. Hogan writes to the defendant, stating that by the decree in June preceding, he, the defendant, had now power to act in relation to the stock, which no one had before, and calling his attention to the point, whether it was stock of the old bank or of the new. Then followed the opinion of Mr. Hogan, carefully considering the questions, dated the 21st of October, 1840, and the letter to the defendant of the 28th of October, 1840. The interviews and correspondence of the defendant with Dunlap and others, ensued. The letter of Mr. Hogan of the 23d of September, 1841, refers to them, and shows that, in the opinion of the counsel of the bank, the decision of the majority of the stockholders bound the rest, and effected the change of the stock. Then followed the letter of the parties to the defendant, and the consequent opinion of Mr. Wood. The failure of the bank was about August, 1841. During the period, then, from July, 1840, to December, 1841, there was an attempt zealously and wisely carried on to establish, that the stock in question was stock of the old bank, and not of the new, and a sale during such attempt would have completely defeated it; and it is absurd

to imagine that any one could have called for it. At a meeting stated by Mrs. Kearney to have taken place in October, 1840, the subject was discussed. One or two wished a sale—none required it. It was plainly left to the judgment of the defendant, and his opinion was acquiesced in. No trustee, placed in an embarrassed position as to a claim very complicated, ever acted in better faith, or more honestly fell into an error of judgment. As to authorities, it is sufficient to refer for the general principle, to Story's Equity, &c. But the case of *Gray* v. *Lynch*, (8 *Gill*, 404,) is entirely decisive of the present case as far as the judgment of the highest court of another state can influence it. There the testator owned stock in the old Bank of the United States. He gave authority to vest in good and safe stocks. The executors and trustees assented formally to the substitution of the stock of the state bank. It was sought to make them responsible for the loss, and the court dismissed the bill. I will not quote the points or reasonings of the court. The case deserves full consideration. I close in the closing language of the opinion, "That if, under such circumstances, a trustee was made responsible by this court, it would deserve any other title than that of a court of equity." This bill should be dismissed with costs.

*Marsh*, in reply. I. The defendant, in his first point, takes it for granted that we do not claim to hold him liable as administrator *ad colligendum*. This is not so, unless his duty as such administrator, to collect and securely hold the estate, was consistent with his permitting it to depreciate, become changed into worthless securities, and fade away.

II. The defendant, in his second point, says that he, as administrator with the will annexed, had no power to sell the stock; but he cites no authority for this proposition, resting it solely on his own assertion. But we have shown, in the plaintiff's opening points, (point 2,) that the defendant had such power; that the general law recognized its existence in him; that the revised statutes confirm it; and that the chancellor, in considering this very will, (8 *Paige*, 310, 311,) held that the

defendant, as such administrator, had power to execute all the trusts in the will, and consequently to dispose of the stock in question. The duty to sell is expressly enjoined by the will. This order and discretion is mandatory, imperative, absolute. It lies at the bottom of the whole matter, always excepting the legal obligation and duty of the administrator to realize effects, independently of any order. The defendant says that it is insisted in the opinion given by Mr. Hogan, that the administrator had not such power. This opinion, even if it were correct so far as regarded the execution of certain trusts, assuredly did not apply to the ordinary action of the administrator for realizing and securing the estate; that was his proper, independent duty, whatever disposition of such estate might afterwards be made. But whether or no, what has this opinion, gratis, in 1840, to do with the action or non-action, or neglect and default of the defendant, through 1837-8-9? He was already in fault and delinquent, an afterward given opinion could not save him from the consequences of antecedent acts or omissions of acts.

III. The defendant, in his third point, contends that even if he had the power, yet he was fully justified in omitting to sell the stock, and in holding the new stock in the state bank as its substitute. (1.) He endeavors to establish this point, in the first place, by saying that the defendant did not do any act to effect the change or substitution of the stock, except by recognizing it. This very recognition of the change or substitution thus admitted, was an adoption of it, equivalent to an actual original participation. It was not necessary that he should do any act towards effecting the change, to make him liable. A neglect to do his duty, that is to say, to withdraw the funds from their precarious and unsanctioned position in the state bank stock, and invest them under the authority or in accordance with the principles of the New York courts, involved the same responsibility, as positive wrongful acts. (*Vide the authorities cited under the plaintiff's 2d point, viz:* 1 *Madd.* 298; 5 *Vesey*, 839; 5 *Pick.* 96; 4 *Barb.* 626; *N. Y. Legal Obs.* 10, *p.* 321, *an English essay, and cases cited therein.*)

(2.) The defendant, in his second subdivision of his third point, contends that the suffering a substitution of the stock was a justifiable and proper exercise of the discretion given to the trustees by the will, or necessarily vested in them by law. We have anticipated and answered this point, in the first subdivision of the plaintiff's second point of the opening argument. The defendant says, in sustaining this proposition, that the second clause of the will authorizes the trustees to suffer such part of his personal estate as was invested in bank stock, to remain in its present state, so long as they should deem it for the interest of his family. But it is obvious, that when it became converted from the stock of the national institution, with all its guards and checks and guarantees, into stock of the state bank, which was obliged to abstract and contribute several millions of its capital to state improvements, by way of purchasing its charter, the said personal property, thus metamorphosed, did not remain in its then "present state," and the discretion of the defendant, if any he had, became annulled. That the stock in the national bank "did not remain in its present state," so as to come within the discretion given by the will, when it was changed into the state bank stock, is patent on the face of the charters. The first bank, with $35,000,000 capital, was held to the extent of one-fifth by the government, and had its aid and support. The second bank was not connected with the government, but was opposed by it; and out of its capital was required to pay $2,000,000 bonus, to loan about $6,000,000 on disadvantageous terms, and to subscribe to a variety of companies of uncertain character and doubtful results, large amounts of stock, without any control over the action or management of such companies. No discreet man would consider stock in the second bank to be in the same state as stock in the first bank. The defendant argues that the testator knew, before his death, that the national bank had failed to obtain a recharter, and that consequently this particular clause of the will, giving the trustees discretion to allow such of his personal estate as was invested in bank stock, to remain in its then present state, applied to other bank stocks, of which he held a number, and

was inapplicable to this stock. It is evident that the discretion given by this clause of the will, does not cover the state bank stock, the sale of which is absolutely within the terms of the positive order to sell. Of course, then, as the defendant shows that the clause of the will from which he seeks to draw his discretionary power has no application to the present case, the argument on that point would seem to be ended. The defendant says, that if the discretion did not vest in the trustee, the power to sell did not. But the order to sell is not a power, technically so called, or trust, or connected or entangled with any trust, but a naked order; and its fulfillment gives the means to execute the trusts, and to administer the estate. Besides, the law, independent of the explicit order, devolved on the administrator the duty to sell.

The defendant contends that it was in the exercise of an honest discretion to leave the stock in the new bank; because most of the stockholders of the old bank took or retained their stock in the new. We reply: (1.) That the judgment of the old stockholders is not the criterion adopted by this court. If they had chosen to sell their stock and invest the proceeds in the personal obligations of Mr. Biddle, it would have been no justification for a similar action by the defendant with these trust funds. (2.) Those stockholders who permitted their stock, by going into the new bank, to be devoted to the internal improvement of Pennsylvania, exercised their discretion very injudiciously; for, as Mr. Robbins says, in the part of the evidence cited by the defendant, it "was very much to their subsequent regret." (3.) It was not a matter of discretion with the defendant at all. He was bound, with all diligence, to rescue the funds from the grasp of this cotton-speculating, bonus-paying, reckless-loaning institution of Pennsylvania, and invest them at home, according to the modes sanctioned by our courts. The defendant says that the stockholders of the old bank became stockholders in the new, without any action of their own, but by force of this act of Pennsylvania merely. We reply:

(1.) The sanction of silence, and the subsequent recognition of the new bank, were tantamount to positive affirmative action,

and charged with the same responsibilities. (2.) We hold the defendant liable for not having interfered, affirmatively, and by withdrawing the funds, prevented them from passing into the state bank.

The defendant says that the continuance of the stock in the state bank was with the approbation of every one interested who was competent to assent. We reply: (1.) If it was so it would not, surely, justify the defendant, so far as those who were not competent to assent were concerned. No one had authority to assent for them. The order to sell—the duty to sell—were imperative. The consent of Mr. Hogan that it should remain, if given, which is denied, would not alter the duty of the administrator, or lessen his liability. He was not, by the terms of the will, a consenting party; his interests, too, were adverse to those of the *cestuis que trust,* and as for the infants he was only guardian *ad litem*, and not *in rem*, not of their property interests. (2.) But we have shown, in the plaintiff's opening point 2, sub. 3, that the above proposition of the defendant is not correct in point of fact.

The defendant alleges that the parties who were competent to assent were aware that the stock had been changed. This would not justify the defendant as to those not competent to assent. The question is not what knowledge some of the *cestuis que trust* may have had, but what was the legal duty of the defendant as such administrator and trustee. That duty did not depend upon the knowledge of those for whose benefit he held the fund. The defendant says that they received the dividends in the share of income which was divided among them, and allowed the defendant to pass his accounts before the surrogate and master without objection. The *cestuis que trust* received, doubtless, whatever the trustee chose to pay them as dividends; but whether they knew where they came from, is neither apparent nor important. Such receipt did not adjudicate and settle any question relating to the defendant's negligence. The accountings, as by reference will appear, embraced only the moneys received from income, sales of lapsed shares of estate, and amounts paid in on account of principal for re-investment

No examination was had as to the value of the investments of principal, whether made by the testator in his lifetime, or by the administrator since. Such accounting for 1000 shares of stock merely extended to the production of the certificates of stock. Nothing is therein stated as to liability for not converting into money at the proper time; that was not the province of the master. Besides, the bill in this case was filed before such accounting, and the matter was before the court, and not before the master.

The defendant urges that no trustee, placed in an embarrassed position as to a claim very complicated, ever acted in better faith, or more honestly fell into an error of judgment. We reply: (1.) There was not the slightest complication about the matter. The defendant's duty was very plain—no turnpike plainer; simply to sell the stock and invest the proceeds under the sanction of the court. It is the duty of the administrator to gather into his hands and realize the personal property of the estate, so as to have it ready for distribution according to law—or, application under a will. How simple is this proposition; it is the fundamental principle of administration; it is common sense, it is justice, it is law. Parties who are absolute owners of stocks, may indulge in speculative ideas of future and contingent values; not so an administrator. (2.) It is not necessary to a recovery that the defendant should be proved to have acted dishonestly. If he chose to swerve, though from the best motives, from that plain path of duty and entire safety prescribed for administrators and trustees, the risk of loss is upon him. No better illustration of this principle could be found, than in the case cited from 4 Barb. 626, where the court, taking pains to testify to the high character and integrity of Judge Emott, yet held him strictly to the rule.

The defendant's search has brought to light one case, (8 *Gill*, 404,) which he thinks is entirely decisive of the present. He seems to have forgotten that in that case the express direction of the testator to invest in stocks took the case out of the very rule of equity on which we rely. No such authority was given by the will of Mr. Clendenning. It is, besides, to be remarked

of this case in Gill, that the Maryland law is loose in regard to the duties of executors, administrators and trustees, never having adopted the English rule. This is sufficiently evident from the opinion of Dorsey, J., who, in delivering the judgment of the court, remarks: "In the course of the argument of the various points relied on in this case, to charge the defendant with the loss complained of, an immense mass, both of English and American authorities, have been referred to, to prove that, in the states or country where those decisions were made, an investment of a trust fund by executors, guardians or trustees, in bank stock, was a breach of trust, and subjected those by whom it was made to all the losses and casualties resulting therefrom. In answer to these authorities it might perhaps be sufficient to say, that the English chancery rule in regard to the securities in which trust funds can only be legitimately invested, has never, literally or analogically, been extended to Maryland; and that the American authorities cited, for the most part depend on statutory enactments of the state in which those decisions have been made, or rest on principles sanctioned by the courts of those states, but which have never been adopted, directly or indirectly, in the state of Maryland." Magruder, J., in his dissenting opinion, arrives at a conclusion more in accordance with right, and with English and American law. He says: "I must, however, think that the loss here to be sustained, ought to be borne by men who undertook the trust and then transcended the bounds of their trust duty," &c.

IV. It will be perceived that the defendant does not any where contend in his points and argument that he was not liable as trustee for not having sold the stock immediately upon his appointment as such. His main argument consists of the various divisions and subdivisions under and in support of his third point, which is that, "supposing that as administrator, the defendant possessed ample power, he was fully justified in omitting to sell the stock," &c. And yet we had contended, in our second opening point, that even if the defendant was not liable in his capacity of administrator, he surely was as trustee.

V. On the whole, then, we say it is the duty of an adminis-

trator to collect, realize, and hold securely, the personal estate of the decedent, so that it be ready for distribution; or, in case of a will, for application under the directions of such will. An order in such will that he should so realize and convert into money, if it do not strengthen and enforce the obligation already imposed on him by the law of administration, certainly takes away any reason for favorable consideration in the event of injury through his neglect. The defendant was appointed administrator *cum testamento annexo*, Feb. 4, 1837; in Feb. 1838, he had become derelict from duty, and so continued through 1838, 1839, 1840, and throughout. His responsibility and liability accrued and was conclusive upon him in 1838. No after correspondence, no requests or non-requests, or refusals of requests, no after given opinions, correct or incorrect, in 1839, 1840, or any after time, of parties interested or not interested, agreeing or disagreeing, of distributees or *cestuis que trust*, (all infants,) can be urged in palliation of a plain neglect of duty, in 1837 and 1838.

*By the Court*, MITCHELL, P. J. The testator made his will in 1829, and died January 28, 1836. On the 4th of February, 1837, the defendant was appointed administrator with the will annexed. The testator, at his decease, held 1000 shares, of $100 each, in the stock of the Bank of the United States—the National institution. The charter of that bank expired on the 4th of March, 1836. On the 18th of February 1836 the state of Pennsylvania chartered "The United States Bank," the institution of that state. This last institution was intended to take the place of the former, and it was generally supposed that it would do so, to a great extent; those who disliked the first extending an equal dislike to the second, and those who had confidence in the first generally reposing an equal confidence in the second. The testator, by the second clause in his will, directed his real and personal estate to be converted into money, as soon as convenient, after his decease, and the proceeds to be securely invested in *the most productive* manner, "leaving it, however, to the *discretion* of my said trustees to *suffer* such part of my

personal estate as is now invested in *bank stock* to remain in its present state, so long *as they may deem* it most for the interest of my family." The testator must specially have referred to this stock, as it formed a large part of his estate, and especially of the part invested in bank stock. He must have known what his will was, in the month when he died, and that this discretion applied to this stock; and he must also have known that the national institution would not then probably be rechartered. He must therefore be considered as sanctioning the continuance of this stock either in the same bank if re-incorporated, or in one substantially similar, or which might be regarded as in some sense its successor. If congress had rechartered the same bank, the case would have been clear. If it had chartered a new institution on a similar plan, with a right to subscribe open to all, and by arrangement between the new and old banks this subscription had been transferred to the new, his intention would probably have been that such transfer should be made. Here the difference was that a state institution took the place of the national one, and by arrangement between them the stock was thus transferred. There was no more reason to apprehend loss from the institution having a state charter than from its having a national one. The executors, therefore, could not be charged with any breach of duty in not interfering to prevent (if they could have prevented) this arrangement between the two institutions, or in not claiming payment of the value of their stock from the old institution. The defendant did nothing to aid the transfer, and when asked to take measures to make the old bank liable (as he had not assented to it) no proof is shown that he did not take a course satisfactory, at the time, to the plaintiffs. He was advised by counsel that it was inexpedient to attempt such a suit after dividends had been accepted from the state institution. The administrator barely *suffered* the stock to remain in the state in which it was at the testator's decease, and to pass as the rest of that stock did, except the part subscribed by the United States; and then, finding it so transferred as by a common consent of the stockholders, he received the dividends

on the new stock. This was not a new investment by him. The case of *Ackerman* v. *Emott*, (4 *Barb.* 626,) shows the distinction between the two cases, and that an executor is liable for an unauthorized investment by himself, on personal securities or bank stock, but admits that he is not liable for permitting such investments made by his testator, to continue. Parker, V. C. says, (*p.* 635,) the case of *Powell* v. *Evans*, (5 *Ves.* 838,) held that executors who neglected to call in money lent by the *testator* on a bond, should be charged with the loss that might be sustained by the subsequent failure of the obligors. He adds, "this doctrine has not perhaps been carried to this extent in this state. The case of *Thompson* v. *Brown*, (4 *John. Ch. Rep.* 619,) may be regarded as somewhat modifying it." "If the rule has not been so rigidly enforced here, as to collecting money already *invested by the testator*, I think it has been equally strict with the English courts, in insisting upon proper investments, when made by the trustee." "An examination of that case, (*Thompson* v. *Brown*,) however, shows that it was not a case of investment made by the administrators. They only *permitted* the business to be carried on as they found it. Chancellor Kent there says, 'This was not a new and distinct original trading with the assets voluntarily entered into by the administrators. They found a store of goods in possession of a surviving partner, and they had no alternative but either to suffer him to go on and sell on the usual terms and under a continuation of the confidence reposed in him by the intestate, or to divide the goods and sell the store of R. at auction." The vice chancellor thus approves of that case and of the distinction between it and the one before him, and on that distinction sustains his own decision as consistent with that case and with *Brown* v. *Campbell*, (*Hopkins*, 233.) This last case is also approved, on the same distinction, in the opinion delivered at the general term, by Justice Strong, affirming vice chancellor Parker's decision. He says (4 *Barb.* 647) "In *Brown* v. *Campbell* Chancellor Sanford sustained the *exchange* of the *notes* of the Union Cotton Manufactory for the *stock* of the Otsego Cot-

ton Manufactory. That however was not an original investment of money, but simply the *exchange* of one doubtful security for another, and might have been the best arrangement which could have been made."

This transaction, if the administrator had actively engaged in it, would have been only an exchange of one security or investment not approved by the courts, for another of the like nature, and generally considered at the time, equally safe, and would at that time appear a much better arrangement than a contest with the old bank for the payment of the testator's interest in the stock—a contest which probably could not end until all the claims against the bank had been settled; and then (if an opinion entertained by many was correct, and the old bank was really insolvent) would have resulted in a total loss of the stock and the payment of heavy costs and counsel fees. In this case quite as much as in *Thompson* v. *Brown*, or in *Brown* v. *Campbell*, the administrator was justified in suffering the exchange of investments to be made, and ought not to be held accountable for any supposed loss that has resulted. He had no alternative but to suffer the change which at the time must have appeared expedient, or to enter into a controversy which probably would have resulted no better than the course which he adopted.

Could an executor be blamed who allowed his testator's shares in the stock of the chartered Chemical Bank to become part of the stock of the new bank under the general law. It is believed that an eminent lawyer, who held such stocks as executor threatened a suit against the new bank to compel it to allow him to come in and participate in its stock. Yet the banks are entirely distinct in interest. So it is believed that generally, when the charters of old banks have expired, their stock has been transferred to the new bank of the same name, unless express dissent was manifested; and that such dissent seldom occurred. This shows that the administrator was guilty of no negligence in not interfering with the transfer that was made.

The bill should be dismissed; and as the administrator is not in fault and should not be subjected to the payment of his solicitors' costs, it is with costs.

[New York General Term, May 7, 1855. *Mitchell*, *Clerke*, and *Cowles*, Justices.]

20 119
30 39
48 612
27a 448

THE UNITED STATES TRUST COMPANY OF NEW YORK, receiver of the Knickerbocker Savings Institution, *vs.* BRADY.

Where moneys deposited with the Knickerbocker Savings Institution, were loaned by such institution to the defendant, upon his promissory note, payable on demand, secured by the hypothecation of 32 shares of the capital stock of the Knickerbocker Bank; *it was held* that the note was not a violation of the charter of the savings institution, nor of the act of April 15, 1853, relative to savings banks in the city and county of New York and the county of Kings. (*Laws of* 1851, *ch.* 100; *of* 1853, *ch.* 257.)

The 6th section of the act of 1853 was intended to be, and is, only a prohibition against the loaning of the funds of savings institutions on mere personal securities.

A loan, when the note of the borrower, payable on demand, is taken, is not a loan on the *security* of that note. The note is only an evidence of the debt. If stock is hypothecated to secure the payment of the note, the loan will be deemed to have been made upon the stock.

The charter of the United States Trust Company of New York, is not unconstitutional.

That company is not a corporation created for banking purposes, within the meaning of section 4 of article 8 of the constitution.

The constitution gives the legislature the power, in its discretion, to create corporations other than banks, by special charter. And when that discretion has been exercised, the courts cannot review the action of the legislature.

THE nature of this action, and the defense thereto, appear concisely from the opinion of the court. The action was tried before his honor, Justice CLERKE, without a jury, at the city hall in the city of New York, on the 16th of March, 1855, and a judgment rendered *pro forma* for the plaintiffs, for the amount claimed upon the note in suit, with interest, &c. The case was directed to be heard before the general term in the first instance.

*Chas. H. Hunt*, for the plaintiff.

*John Graham*, for the defendant.

*By the Court*, MITCHELL, P. J. The Knickerbocker Savings Institution, chartered by the act passed April 8, 1851, chapter 100, amended by chapter 257 of laws of 1853, while in existence, and in the course of its business, on the 7th of January, 1854, out of the moneys deposited with it, loaned to the defendant $700, taking from him as security for its repayment when required, an hypothecation of thirty-two shares of the capital stock of the Knickerbocker Bank, which stock was owned by the defendant, and was of the nominal value of $800, and also taking his note, promising to pay the $700 on demand with interest. The savings institution afterwards became insolvent, and its assets and affairs passed by an order of a justice of the court, to the plaintiff as receiver. This action is brought to enforce payment of the note. The complaint counts only upon the note. The above facts are in substance averred in the complaint and answer, and were admitted by both parties at the trial; and no proofs were given on either side.

The defendant claims that the transaction was in violation of both of said acts, and particularly of the 6th section of the latter act; and that the plaintiff is not the lawful holder of the note. Judgment was rendered, at the circuit, in favor of the plaintiff, for the amount claimed, with interest and costs, which judgment is now the subject of review by the court at general term.

The note in question was not a violation of the charter of the savings institution, nor of the act of 1853. The 6th section of the latter act was intended to be, and is, only a prohibition against the loaning of the funds of savings institutions on mere personal securities. It was intended for the protection of the depositors, who, being generally in moderate circumstances, and not well able to take care of their funds, would wish to deposit them where they would be safe. The legislature meant to make certain the securities to be taken for them by prohibiting

loans on personal securities, and requiring that the loans should be on certain stocks or on mortgages. A loan, when the note of the borrower, payable on demand, is taken, is not a loan on the *security* of that note. That note is only an evidence of the debt. These banks are regarded as quasi guardians or trustees for their depositors. A statute that no guardian, executor or trustee should loan the funds of the estate on notes, drafts or other personal securities would not make void a note taken in this way; for that would defeat the very object of the legislature, which was to protect and secure the depositors in the one case, or the beneficiaries of the estate in the other. The prohibition was not to protect the public against any evil which could come to it from those banks holding personal securities, but to save the money of the depositors.

A mortgagor, when sued upon his bond, could not set up that the latter is void under the section in question. In that case the loan would be, not upon the bond, but upon both the bond and mortgage; principally the latter. In the present case, the loan may be said to have been made upon the hypothecated stock, with the note as evidence of the debt.

If the note were void, and the point made by the defendant's counsel, that the action should have been for money lent, were technically sound, (*See Utica Ins. Co.* v. *Kip*, 8 *Cowen*, 20,) such a count might be added to the complaint, in any stage of the action, or the complaint would be considered as amended accordingly; or, as these facts are stated in the answer, they could be treated as proved at the trial, and the defendant could not object to them on the ground of variance, as he could not pretend that he had been misled. (*Code*, §§ 169, 170, 275.)

The charter of the United States Trust Company of New York is not unconstitutional. It is not a corporation created for banking purposes, within the meaning of section 4, of article 8, of the constitution. Banking is there used in its then and still familiar and popular sense, that business which might be carried on by banking associations under the law to authorize the business of banking, passed April 18, 1838. That law had been amended and reference made, each time, to its title

authorizing "the *business of banking*," before the constitution was adopted, in 1840, ch. 363, in 1841, ch. 26, ch. 319, in 1844, ch. 41, ch. 281, and the meaning of the word had thus become fixed by legislative usage also. The duties of this company are prescribed by the second section of its charter, which do not include banking powers. The constitution gives the legislature the entire discretion of creating other corporations than banks, by special charter. (*Art.* 8, § 1.) That discretion has been exercised in this instance, and courts cannot review its exercise. This was so held at the general term, when the charter of the plaintiffs was first brought before its notice, on a motion that the court should appoint a day on which the annual accounts of the company should be submitted to the court, under § 20 of its charter.

The judgment must be affirmed, with costs. The receiver, on the defendant's giving security for the costs of the action, and of an appeal to the Court of Appeals, may waive any further security on said appeal, as there is a large number of cases in which the same questions are intended to be raised, and it is important to have the decision of the court of last resort as promptly as possible in the case.

[New York General Term, May 7, 1855. *Mitchell*, *Clerke* and *Cowles* Justices.]

## MOUNT *vs.* MORTON and others.

20 123
43 549
57 289
36a 504
118a 249

A testator, by his will, made in March, 1801, gave to his wife the income of his real and personal estate, during her widowhood. He then devised as follows: "I give and bequeath unto my oldest son, Jacob, the corner lot, on the corner of Hester and Elizabeth streets; I also give and bequeath unto my eldest daughter, Barbara, the lot adjoining the corner, facing Elizabeth street; I give and bequeath to my daughter Eliza, the lot adjoining the above, facing Elizabeth street; and I also give and bequeath to my youngest son, William, the lot adjoining the above." The testator died in March, 1801, and his son William in August thereafter. After the testator's death, each of his four children claimed and took one lot; the corner lot being called Jacob's, the next south, Barbara's, the next, Eliza's, and the next, William's. In 1823, the widow of the testator conveyed to Jacob all her title to any lands of which her husband died seised or possessed. Jacob then conveyed *in fee* to J. S. the whole of lot No. 137, without any thing to indicate that he was selling an undivided interest only in the lot. In 1822, Barbara, with her husband and the widow, mortgaged lot No. 136 to C. for $650; nothing in the mortgage indicating an intention to pass the title to an undivided share only of the lot. This lot was afterwards sold on a foreclosure of the mortgage, and purchased by C. Before this sale, and after the conveyance by the widow to Jacob, the latter conveyed to J. S. all his "estate, right, title and interest" of, in and to lot No. 136, "being an estate in said Jacob M. for the life of his mother." In 1829, Eliza joined with her husband, A., in conveying the whole of lot No. 135 to P. in fee, with full covenants, and without any intimation that the grantors conveyed, or had only an undivided interest in that lot. William died an infant, in 1801, and his estate passed to Jacob, Barbara and Eliza. In 1821, Barbara and Eliza, with their respective husbands, joined with the widow, and conveyed to Jacob, in fee, two undivided third parts of lot No. 134, by a deed, with full covenants as to the estate granted, and describing themselves as co-heirs of William with Jacob. In 1822, Jacob conveyed this lot to P. C., with full covenants, and without any intimation that he conveyed only an undivided share. Barbara died in 1835, leaving six children, one of whom died in 1839. The plaintiff was one of her children. He claimed, that the will gave only a life estate to each child, in each lot; that his mother, on the death of William, was entitled to an undivided third in each lot, in fee; that such right descended to her six children, and on the death of one of them vested in the five survivors; and that the plaintiff was thus entitled to one fifteenth part of lots 136 and 137.

*Held*, 1. That, assuming that the will did not convey to each child the fee of the lot devised to him or her, but only a life estate in it, it was plain that each child must have known that it was the intention of the testator to convey the fee. That slight evidence ought to be sufficient in such a case, that they had determined to carry out the real intent of their father, although not expressed according to law. That here was the strongest evidence that they had so de-

termined, and that they carried out this honest determination; every act of theirs showing that determination, and showing it in a manner strictly conformable to law.

2. That if the will did not give a fee to each child in a separate lot, then each child had a life estate in a separate lot, and they were together tenants in common of the reversion in fee, in all the lots, which reversion descended to them as the heirs at law of their father, as real estate not disposed of by his will.
3. That if the doctrine of estoppel could be applied so as to prevent parties disturbing a partition, merely because there had been possession under it, there was much more ground for applying it where, as in this case, each owner had, by his or her deed, claimed to own a separate lot in entirety, and had, under that claim, conveyed the land by deed or mortgage, and subsequent foreclosure, and received from the purchasers the full consideration for the entire title to the lot, under this representation, made by all and by each, that each held a lot separately in fee, and without any co-tenant. That all the children of the testator, therefore, were estopped now from denying that each held his own lot in fee and in severalty.
4. That if each of the owners had been together when they conveyed, and had at the same time conveyed to the several purchasers, there could be no doubt that they each claimed to hold a lot in severalty, and conceded to the others the like right. Such conveyance would be conclusive evidence of a *partition* previously agreed on; and they, by their acts, causing others to believe it was made, would be estopped from denying it. That the conveyances, made separately and at successive times, equally established the fact of a partition previously agreed on.
5. That it made no difference that Barbara and Eliza were married women. A married woman can no more be allowed to commit a fraud than a single woman. She is competent to knew the difference between fraud and honesty, and to understand the obligation not to stand by and allow another to purchase from her on the supposition that she has a perfect title, when she knows she has not.
6. That these acts and deeds of the parties were such evidence of an actual partition between the parties that a jury or court ought to find that there was an actual partition in fact. And that the several deeds and the mortgage confirmed that partition, so as to bind even the married women; the deeds and mortgages having been acknowledged by the latter on a private examination, so as to pass their title.

It is well settled, that tenants in common may make partition by parol; and that it is binding when followed by possession according to the partition.

APPEAL by the plaintiff from a judgment entered at a special term, in favor of the defendants, with costs. The following opinion, delivered at the special term, states all the material facts:

"MITCHELL, J. The plaintiff commenced his action to recover an undivided fifteenth part of lots Nos. 137, 136, on Bayard's map; the first at the southwest corner of Hester and Elizabeth streets, and the other on the west side of Elizabeth street, both lots fronting on Elizabeth street. Jacob Meyers, the elder, owned those two lots, and the two other lots, Nos. 135 and 134, next adjoining on Elizabeth street, in 1776, and at the time of his death. He made his will, dated March, 1801, and died in that month; on the 21st of May, 1801, his will was proved. He left surviving, his widow, Catharine, who died in 1836, and four children—Jacob, born in 1791; Barbara, born in 1794; Eliza, born in 1796; and William, born about 1798. By his will he gave to his wife 'the income of his real and personal estate, during her widowhood.' He gave the four lots above referred to in the following terms: 'I give and bequeath unto my oldest son, Jacob, the corner lot, on the corner of Hester and Elizabeth streets; I also give and bequeath unto my eldest daughter, Barbara, the lot adjoining the corner, facing Elizabeth street; I give and bequeath to my daughter, Eliza, the lot adjoining the above, facing Elizabeth street; and I also give and bequeath to my youngest son, William, the lot adjoining the above.' William died in August, 1801, about five months after his father. Eliza, the daughter, was called as a witness for the plaintiff, and on her cross-examination testified that each one of the four children, after the father's death, took one lot; that the corner lot was called Jacob's, the next south, Barbara's, the next, Eliza's, and the next, William's; and that, from the time of the death of her father, each one of the children claimed each a separate lot; Jacob, the corner; Barbara, the next; Eliza, (the witness,) the next, and William, the last. In January, 1823, the widow of the testator conveyed to her son, Jacob, all her title to any lands of which her husband died seised or possessed. In the same month Jacob, the son, conveyed *in fee* to James Sivalls the whole of lot No. 137, for two thousand five hundred dollars, with full covenants of seisin (of title in fee) and for quiet enjoyment, and further assurance and warranty, without any thing to indicate that he was selling an

undivided interest only in the lot. In December, 1822, Barbara, with her husband, and the widow, mortgaged lot No. 136, a vacant lot, to P. Clapp and wife, for six hundred and fifty dollars, with the usual power of sale, and a declaration that such sale should be a perpetual bar, both in law and equity, against the mortgagors, their heirs, &c. Nothing in this mortgage indicated an intention to pass the title to an undivided share only of the lot. The lot was afterwards sold on foreclosure, in chancery, on the 2d July, 1824, to Clapp, for nine hundred and twenty dollars, and by him on the 15th July, 1824, conveyed to Sivalls for the same consideration, with full covenants of title. Before this sale, and after the conveyance by the widow to Jacob, in January, 1823, Jacob Meyers, the son, and his wife conveyed to Sivalls 'all the estate, right, title and interest of the parties of the first part, of, in and to lot No. 136, being an estate in said Jacob Meyers, for the life of his mother, Catharine Meyers.' Eliza married Robert Archbald, in October, 1819, and she joined with her husband, in 1829, in conveying her lot, No. 135, to William Pinckney (by the deed conveying the whole lot in fee with full covenants,) and without any intimation that the grantors conveyed, or had, only an undivided interest in that lot. William having died an infant in 1801, his estate passed to his brother Jacob, and his two sisters, Barbara and Eliza. On the 7th of August, 1821, Barbara and her husband, John Mount, and Eliza and her husband, Mr. Archbald, joined with the widow, and conveyed to Jacob Meyers, their brother, in fee two undivided third parts of lot No. 134 for six hundred and sixty-six dollars and sixty-six cents; the deed describes Barbara and Eliza as co-heirs with Jacob the younger of William Meyers, and it has full covenants as to the estate granted. Jacob Meyers, in March, 1822, conveyed this last lot in fee for one thousand five hundred and fifty dollars to Peter Cook, with full covenants, and without any intimation that he conveyed only an undivided share. Barbara married John Mount in 1812, and died in 1835, leaving her husband surviving, and six children; the husband died in 1839; one of the children, Albert, died after his mother, but before his father.

George W. Mount is one of Barbara's children. His claim is, that the will gave only a life estate to each child in each lot; that his mother, on the death of William, was entitled to an undivided third in each lot in fee, and that right descended to her six children, and one of them dying, vested in the five, and that he is entitled thus to one-fifteenth part of lots 137 and 136. He, at the argument, however, claimed only one-fifteenth of two-thirds, considering the conveyance by Jacob as having given a perfect title to one-third, and leaving only the other two-thirds to descend to heirs.

Assuming that the will did not convey to each child the fee of the lot devised to him or her, but only a life estate in it, it is plain that each child must have known that it was the intention of the father to convey to each the fee. Slight evidence ought to be sufficient, in such a case, that they had determined to carry out the real intent of their father, although not expressed according to law. Here, there is not slight but the strongest evidence that they had so determined, and that they carried out this honest determination. Every act of theirs shows that determination, and it is shown in a manner strictly conformable to law. If the will did not give a fee to each child in a separate lot, then each child had a life estate in a separate lot, and they were together tenants in common of the reversion in fee, in all the lots, which reversion descended to them as the heirs at law of their father, as real estate not disposed of by his will.

With us the law is settled that tenants in common may make partition by parol, and that it is binding when followed by possession according to the partition. Kent, Ch. J., says, in *Jackson* v. *Harder*, (4 *John.* 212,) "The validity of the two partitions is not to be questioned. It did not require releases to make the division valid. A parol division, carried into effect by possessions taken according to it, will be sufficient to *sever the possessions*, as between tenants in common, whose titles are distinct, and when the only object of the division is to ascertain the separate possessions of each." The court also say, in *Jackson* v. *Vosburgh*, (9 *John.* 276,) "There is no doubt but that where the *title* is admitted to have been in common, a parol partition

followed up by possession will be valid, and sufficient to sever the possession." The counsel for the plaintiff in the last case admitted the rule, but insisted, as the court also held, that it did not apply there, because a *title* in common was not shown, but the parties held or claimed adversely, and not in common. In *Jackson* v. *Livingston*, (7 *Wend.* 136,) a deed was executed conveying 600 acres *to be surveyed* and taken off a large tract of 15,360 acres; it contained no description of the 600 acres, but a location was subsequently made by the acts of the parties. The court said, (*Id.* 141,) "The deed made the grantees tenants in common with the patentees, and the proceedings locating the right of the grantees operated as a *parol partition*," and then quoted the above two cases. The chancellor also said, in relation to the same deed, in *Corbin* v. *Jackson*, (14 *Wend.* 619–625,) "The parol partition between her [Madame D'Autremont] and Le Fevre was also valid." Nelson, Ch. J., says, in *Ryerss* v. *Wheeler*, (25 *Wend.* 434–6,) probably affirmed in the court of errors, (*see* 4 *Hill*, 468, *n. a*,) "It has been repeatedly decided in this court, that a parol partition carried into effect by possession and occupation, in conformity thereto, will be binding between tenants in common whose titles are *distinct*, and the only object of the division is to ascertain the separate possessions." The same doctrine was held by Judge Harris, in the court of appeals, in the case of *Baker* v. *Lorillard*, (4 *Comst.* 257–262,) and although Judge Bronson differed with him on some points, as to the title of Pearsall in that case, he expressed no dissent on this point, which related to the Pell title. A partition had been made between Mrs. Macomb, representing the Pell title, and only having a life estate, and her husband on one side, and Mr. Campbell, representing the Pearsall estate, and only having a life estate, but with power to partition, on the other side. Mrs. Macomb, after the partition, became the owner of the reversion in fee by the death of her daughter. *In* 1840 *she sold the premises allotted to her*. Judge Harris says, page 262, she "thus *affirmed the validity* of the partition. Having thus ratified the partition made by her when a *feme sole*, and when she was only entitled to a life estate, I think she is *estopped* from

making *any* claim to the premises. Such a confirmation is at least equivalent to a partition by parol, which, it has been often held, will, when accompanied by livery of seisin, bind tenants in common holding under distinct titles"—"as Mrs. Macomb, after she became entitled to the whole estate, has taken the benefit of that division, it must be held conclusive as to her and those claiming under her." Mrs. Pell was married when the partition was made, but single when she conveyed, in 1840. (*See p.* 259, 60.)

But a married woman is as competent to confirm an act done by her, if she confirm it by a deed acknowledged so as to pass real estate, as any other person. It may be said that the separate possession here was consistent with the ownership of a life estate only in each lot, and of the reversion in common to all. But that, with the separate claim of sole title in fee in each lot, and the conveyance according to such claim, was not consistent with an ownership in common in the reversion.

If the doctrine of estoppel can be applied so as to prevent parties disturbing a partition merely because there has been possession under it, there is much more ground for applying it where, as in this case, each owner has by his or her deed, claimed to own a separate lot in entirety, and has under that claim conveyed the land by deed or mortgage, and subsequent foreclosure, and received from the purchasers the full consideration for the entire title to the lot, under this representation made by all and by each, that each held a lot separately in fee, and without any co-tenant. Here Barbara and Eliza joined with their husbands, in 1821, in conveying to their brother, Jacob, two-thirds of the lot that was devised to William, and in their deed they describe themselves as co-heirs *of William* with Jacob. If, as claimed by the plaintiff, there was no separate ownership in fee of each lot, then this representation was false. William had only a title to this lot for life, and a reversion in fee in one-fourth of it, and Barbara and Eliza, instead of being co-heirs with him in that respect of one-fourth of the lot, and able to convey to him as such co-heirs, had only two-thirds of that one-fourth. Jacob, also, then continued the misleading when he sold the title to the whole lot, in March of the next year, to P. Cook.

and those conveyances executed by them, or the first of them, would naturally lead those who dealt with them to believe that they owned each the lot held by him or her in severalty, and had no claim on any other. Then the same belief would be confirmed by the mortgage by Barbara and her husband, in December, 1822, of lot No. 136, and the sale on foreclosure of the same lot, in July, 1824, in a suit in which they both were parties, and by the deed by Jacob in January, 1823, to Sivalls expressly, of *all* his estate in the lot No. 136, and there describing it as being an estate for the life of his mother. This was a distinct declaration to all who dealt with the estate, that he had no title in that lot, except for the life of his mother, and that could only be (if the will did not give each a separate lot in fee) because each had consented to a partition, and taken one lot as his share of the whole. Jacob still further confirmed this belief, and repeated the representation of sole ownership, when he conveyed, in 1823, the whole of lot No. 137 to Sivalls, in fee, and Eliza and her husband finally confirmed them all, when they conveyed in fee the remaining lot No. 135, as the sole owners of it. These acts of the several owners, partly concurrent, as in the deed for William's lot, and partly separate, tended as much to mislead each purchaser, (unless the parties actually owned in severalty, or are estopped from denying that they so owned,) as if the owners had actually represented that they so owned. Eliza, the last to convey, stood by and saw the others convey the other lots as the absolute owners of it, and set up no claim to them; but, as if to confirm the correctness of those sales, she, with her husband, sold the whole of the lot held by her, and they received the purchase money as for the whole. They all, therefore, are estopped now from denying that each held his own lot, in fee and in severalty. If all of the owners had been together when they conveyed, and had at the same time conveyed to the several purchasers, there could be no doubt that they each claimed to hold a lot in severalty, and conceded to the others the like right. That would be conclusive evidence of a partition previously agreed on, and they causing by their acts others to believe it was made, would be estopped from denying it. The

conveyances, made separately and at successive times, equally establish the fact of a partition previously agreed on, although not in so striking a manner. It is true, here there was a partition for the life of each, but the acts of the parties in conveying the fee in each lot, show that that was not the only partition that they had agreed to, but that it was a partition as to the whole title to the lots. Nor was this partition so unequal as at first it might seem. Jacob had the most valuable lot, but its extra value arose principally, if not entirely at that time, from the building on it; and as he had a life estate in that lot, that building would be worth but little after the expiration of that estate of his, so that what was held in common, one-fourth of the reversion, in all four of the lots, was nearly the same as the reversion in the whole of any one lot. If the owners were misled as to the law, and supposed they owned the fee, they ough. not the less to be estopped, as they, by their acts, led others to purchase under the same belief, and they have each received nearly, if not quite the same value as they would have received if they had sold the reversion in one-fourth of each lot.

It makes no difference, in this view of the case, that Barbara and Eliza were married women. A married woman can no more be allowed to commit a fraud than a single woman; her deed is not valid, unless when relating to real estate and duly acknowledged, but she is liable for torts committed by her, and is competent to know the difference between fraud and honesty, and to understand the obligation not to stand by and allow another to purchase from her, who supposes she has a perfect title when she knows she has not.

Another view of the case is equally fatal to the plaintiff's claim. These acts and deeds of the parties are such evidence of an actual partition between the parties that a jury or court bound to draw conclusions from the evidence before it, ought to find that there was an actual partition in fact, and then the several deeds and the mortgage confirm that partition, so as to bind even the married women; the deeds and mortgages having been acknowledged by the married women on a private examination so as to pass their title. Eliza (the witness, now Mrs. Archi-

bald) shows expressly that each took possession of a separate lot, and *claimed* it as his or her own in severalty. The lots, too, were separated, in fact, from each other, the corner lot having a house on it, and lot 135 a house on it, the last erected after the testator's death.

If, as is probable, the statute of limitations cannot apply in this case, notwithstanding the lapse of so many years, it makes it more important that those principles which are preventive of fraud, should be liberally applied.

Judgment should be entered for the defendants, with costs."

*John Townshend*, for the appellant. I. On the death of Jacob Myers, senior, his widow, by virtue of his will, took an estate for life in the four lots Nos. 134, 135, 136, 137. (*Jarm. on Wills, ed.* 1844, *p.* 534.)

II. By the will, Jacob, the son, took a life estate in lot 137; Barbara a life estate in lot 136; Eliza a life estate in lot 135, and William a life estate in lot 134. (*Edwards* v. *Bishop*, 4 *Coms.* 61. *New* v. *Mesick*, 3 *Seld.* 163.)

III. The reversion in the four lots descended to Jacob, Barbara, Eliza and William, and they held the same as tenants in common, in fee.

IV. From the testator's death each of his children claimed a separate lot; each lot was called after the child to whom it was devised by the will; each child took one lot. William died five months after his father, in 1821. Barbara and Eliza, the co-heirs with Jacob, of William, and the testator's widow, conveyed to Jacob two undivided thirds of lot 134, and in 1822, Jacob conveyed lot 134 in fee to Peter Cook. In 1822 Barbara mortgaged lot 136, describing it as the lot devised to her by the will of Jacob Myers, to Philip Clapp. On 25th January, 1823, testator's widow conveyed to Jacob all her estate in said four lots being an estate for her life. To this time she collected the rents. There was only one house on the lots at the testator's death; that was on the corner lot. Testator's widow lived on the third lot from corner—lot 135; she put a building on the lot. There was a vacant lot intervening. Jacob, after the deed from his

mother, built on the intervening lot. On 27th January, 1823, Jacob conveyed lot 137 in fee to James Sivalls, and on the same day Jacob conveyed to said Sivalls lot 136 for the life of his (Jacob's) mother. Jacob died in 1823. Jacob's widow married William Hicks. In 1825, Jacob's widow and administratrix conveyed to Eliza's husband the lot devised to Eliza (lot 135) for the life of Catharine. After this, and not till this, Eliza took possession of her lot. In 1829, Eliza and her husband conveyed lot 135 to W. T. Pinkney. The lot is described as the lot devised to Eliza, and Pinkney paid off the mortgage on it. In 1824 the mortgage of Barbara was foreclosed, said Sivalls being made a party to the suit. On the foreclosure sale the premises were sold to Clapp, and immediately after conveyed by him to said Sivalls. Sivalls held possession of lots 137 and 136 from 1823 to 1828. The testator's widow died in 1836. From these facts, it is evident, (1.) That not one of the testator's children was ever in possession as devisee of the lot devised to him or her. (2.) Jacob had possession only as vendee from his mother. (3.) Eliza never had possession, and her husband only as vendee from the widow of Jacob, the son. (4.) Barbara never had possession. (5.) That *from the death of the testator* each child claimed the remainder in fee, expectant, on the death of their mother, of and in the lot by the will devised to him or her respectively. (6.) That when Sivalls bought of Jacob, he (Sivalls) had notice of the will of Jacob's father, and of the estate each child claimed under it. (7.) That when Barbara mortgaged to Clapp, he knew of the will of her father and the estate each child claimed under it. (8.) There is no proof that any child knew of the dealings with the property by the other. (9.) There is no proof that each child obtained the value of the whole lot. (10.) There is no proof of any intent to mislead, nor that any purchaser was actually misled.

V. Presumptions are only indulged in where there are no other means of ascertaining the fact; (3 *Black. Com.* 371, *Oxford ed.* 1773. 14 *Eng. L. & Eq. R.* 223. *Black* v. *Wright*, 9 *Iredell's R.* 447,) and if a party having conclusive evidence in his power resort to weaker proof, the presumption

is that the conclusive evidence is adverse to him. (*Roe* v. *Harvey*, 4 *Burr.* 2484–7. *Curlewis* v. *Corfield*, 1 *Q. B. R* 814. *Lobb* v. *Stanley*, 5 *id.* 574. *Bell* v. *Frankis*, 4 *M. & G.* 446.)

VI. The presumption of partition is inconsistent with the facts of the claim of each child of a lot in fee *from the death of the testator;* and "if any established circumstance is wholly repugnant to the hypothesis, the hypothesis cannot be true." (3 *Stark. Ev.* 483, 505.)

VII. To ascertain the testator's intention, the court must look to the language of the will, "and apply to it the established rules of law." (*Jackson* v. *Winne*, 7 *Wend.* 52. *Davidson* v. *Davidson*, 1 *Hawks*, 181. *Chandless* v. *Price*, 3 *Ves.* 102.) And the testator's intention thus ascertained, the court will presume that the children meant to carry out that intention. (*Jackson* v. *Christman*, 4 *Wend.* 284.)

VIII. The conveyance by Barbara and Eliza to Jacob, negatives a partition. William died five months after his father, aged three years. Eliza was then aged 5, Barbara 7, and Jacob 10, and there is no ground for presuming a partition among these infants. At the time of the conveyance to Jacob, in 1821, William's lot was treated as though he took it in fee under the will, showing that the children considered the will gave each a lot in fee; also, that no partition had been made since the death of William, or his lot would have been included; also, that no partition was considered necessary, and this was further shown by their subsequent acts.

IX. The fact that each deed purports to convey the whole lot, and not an undivided part, furnishes no ground for presuming a claim of a *sole ownership in fee.* (*Jackson* v. *Mancius*, 2 *Wend.* 357.) Tenants in common have a joint possession. (*Cole* v. *Irvine*, 6 *Hill*, 634.) And in a conveyance by a tenant in common of an undivided share, the conveyance is properly of the whole. (*Edwards* v. *Bishop*, 4 *Coms.* 64.) Besides each grantee had the *whole* lot for life. (*Doe* v. *Reed*, 5 *B. & Ald* 232. *Livett* v. *Wilson*, 3 *Bing.* 115.) And the conveyances being by deeds operating under the statute of uses, only conveyed such an estate as the grantor actually had in the prem-

ises. (*Jackson* v. *Brinckerhoff*, 3 *John. Cas.* 101. *Sparrow* v. *Kingman*, 1 *Coms.* 251. *Collyer* v. *Mason*, 2 *Brod. & Bing.* 685.)

X. The claim of title is so far accounted for by the will as to rebut the presumption of a partition. (*Doe* v. *Millett*, 12 *Jurist*, 1021, *Doe* v. *Powell*, 8 *Q. B. Rep.* 576.) The presumption is that the claim was founded on the will. (*Benson* v. *Bolles*, 8 *Wend.* 175, 181.)

XI. There can be no presumption of a parol partition. A parol partition can only be among tenants in common holding under distinct titles, and must be accompanied by livery of seisin or followed by possession. (*Baker* v. *Lorillard*, 4 *Coms.* 257.)

There cannot be a presumption on a presumption. (*Hammond, adm'r*, v. *Smith*, 17 *Verm.* 231. *Pennington* v. *Yell*, 6 *English*, [*Ark.*] 213. *Duncan* v. *Little*, 2 *Bibb's R.* 26.) If, therefore, from the acts of the parties, it may be presumed that each claimed a sole estate in fee in a single lot, the presumption must there rest. That presumed fact cannot be made the basis of the further presumption that that claim arose out of a partition, and not from the will; especially as the will shows enough to warrant the presumption that the claim was founded on it, and the reasonable and legal presumption is, that each child supposed the will gave him or her a lot in fee, and that the purchasers from the children were of the like opinion.

XIII. There is no evidence nor ground for presuming that in the dealings with the property by the testator's children there was any concealment of the will. The defect in the claim of title in fee was therefore *obvious*, and the presumption is, the defect was known to the purchaser. (*Platt* v. *Scott*, 6 *Blackf.* 390. *Lewis* v. *Jones*, 4 *Barn. & C.* 506. *Lane* v. *Shears*, 1 *Wend.* 433.) Fraud is never presumed, (*Dardume* v. *Hardwick*, 4 *Eng. R.* 482,) and cannot be inferred by argument. (*Austin* v. *Cummings*, 10 *Verm. R.* 26.)

XIV. Estoppels are not favored—they are odious—to be used as a shield sometimes, never as a sword. When an estop-

pel *in pais* takes place, (*Carpenter* v. *Stilwell*, 1 *Kernan*, 61. *Lawrence* v. *Brown*, 1 *Seld.* 401. *Wright* v. *Douglas*, 10 *Barb.* 97. *Griffith* v. *Beecher*, *Id.* 432. *Ryerss* v. *Farwell*, 9 *id.* 615. *Warren* v. *Leland*, 2 *id.* 622. *Sinclair* v. *Jackson*, 8 *Cowen*, 543. *Brannock* v. *Bouldin*, 4 *Iredell's Law R.* 61. *Lewis* v. *Carstairs*, 5 *W. & S.* 209. *Watkins* v. *Beek*, 12 *New Hamp.* 373.)

XV. The estate each child took under the will was a question of law. Their assertion of estate was only their construction of the will. It was not a question as to the quantity of land, but the quantity of estate in the land. A party is not estopped by his assertion of a conclusion of law. (*Brewster* v. *Striker*, 2 *Coms.* 41. *Chautauque Bank* v. *White*, 2 *Seld.* 253. *Jewett* v. *Miller*, *Court of Appeals*, *Dec.* 1852. *Moore* v. *Hitchcock*, 4 *Wend.* 292. *Hawley* v. *Bennett*, 5 *Paige*, 104. *Cowper* v. *Cowper*, 2 *P. Wms.* 720. *Mathews on Pres. Ev.* 198. *Selden* v. *Vermilya*, 3 *Coms.* 534.)

XVI. All estoppels must be mutual, and they bind only parties and privies. (*Sparrow* v. *Kingman*, 1 *Coms.* 247. A grantee in a deed is never estopped to deny his grantor's title. (*Sparrow* v. *Kingman*, 1 *Coms.* 247. *Averill* v. *Wilson*, 4 *Barb.* 180. *Hill* v. *Hill*, *id.* 419.) Jacob's deed to Sivalls did not estop Barbara's children. Eliza's deed did not estop Barbara's children. The mortgage by Barbara did not estop the claim of her children on Jacob's lot. (*Lawrence* v. *Brown*, 1 *Seld.* 401. *Jackson* v. *Brinkerhoff*, 3 *John. Cas.* 101.) The declaration in the mortgage by Barbara and her husband that a sale should be a perpetual bar did not bind her children. (*Dominick* v. *Michael*, 4 *Sand. S. C. R.* 423. *Albany Fire Ins. Co.* v. *Bay*, 4 *Coms* 9. *Doe* v. *Errington*, 6 *Bing. N. C.* 83. *Jackson* v. *Vanderheyden*, 17 *John.* 167. *Carpenter* v. *Schermerhorn*, 2 *Barb. Ch. R.* 314.)

XVII. The decree of foreclosure did not bar Barbara and her heirs. It was *pro confesso*. (1 *R. L.* 102, § 3.) Barbara had no next friend. (*Lewis* v. *Smith*, *Court of Appeals*, *April*, 1854. *Voorhies' Code*, *p.* 89, *note.*)

*Jas. R. Whiting*, for the respondents. The premises in question are parts of the lots, called in the conveyances No. 137 and No. 136, the first being the corner lot, and the other the lot adjoining the corner, No. 137 being the same given by the will to Jacob, and No. 136 being the same given by the will to Barbara.

I. The fee of those lots was vested *by the will* in Jacob and Barbara severally. It is undoubtedly true that prior to the revised statutes the word "give," alone, did not in a will create a fee; but it has always been held that no technical words are necessary to carry a fee, and that the intention, if it can be legitimately gathered from the *various provisions* of the will, is to govern. The words "give my *estate*," have been held to carry the fee. (*Jackson* v. *Babcock*, 12 *John.* 389. *McLean* v. *McDonald*, 2 *Barb. S. C. R.* 534.) The intent of this testator is to be gathered from all the provisions of this will, and looking at them, it cannot be doubted that he intended to vest the fee of those lots in his children. (1.) He clearly intended to dispose of all his interest in the property, for he gives an estate for widowhood at least, and contingently, (and in point of fact in this case,) for life to his widow, and then "gives" the lots to his children; it has never been decided, and I trust never will be, that when an estate for life is devised to A. in a lot, and then the lot is "given" to B., that B. takes only a life estate. Such a decision and construction would be a manifest absurdity. (2.) The testator uses the word "give," in the clause as to the farm; in that clause, his clear intent is to dispose of the whole interest, for he directs the sale and conversion into money, and its appropriation to the use of his four children. The word "give," here, must have been used to create a fee, otherwise the sale of the farm would produce nothing, and then nothing could be got for the use of the children. The widow already has an estate in the farm during her life, if she do not marry, and at all events during her widowhood, and of course any sale of the farm must be subject to this interest. Now if the children have only a life estate in the farm, the sale of such an estate subject to the widow's estate, manifestly would produce nothing effective for the children's use. Where

as the sale of the fee, subject to the widow's rights, would produce a substantial sum. The word "give," therefore, in this clause operates to carry a fee, according to the clear intent of the testator, and having used the word here for that purpose, it shows what meaning he intended for the same word—in what sense he used it in the preceding clause, and this is a fair and legitimate rule of construction—a proper and careful mode of arriving at the intent and meaning of the testator in his use of the word "give," in his will generally. (3.) If the word "give" is not held to create a fee in these lots, it follows that all the testator gave, or intended to give to his children, was a life estate, subject to the life estate, or, at any rate, to the freehold estate already given to his wife; such an interest would be valueless, or next to valueless, and it cannot be supposed that a father so intended. The rule of the common law being, that the word "heirs" whether in a will or deed, was requisite to create a fee, it was held that the word "give" alone did not create that estate; but, the rule being equally undoubted, that in a will the intention is to govern, if that intention can be ascertained by construing all parts of the will together, it has not I apprehend ever been doubted, that the word "give" without the word "heirs," would vest a fee, where from other provisions of the will the intent to create such an estate was manifest. In the cases where it has been held that the word "give" did not carry a fee, there have been no other clauses or provisions in the will, going to show that the testator must thereby have intended to vest a fee. It is a fact undisputed in this case, that the four devisees were the testator's only children.

II. If the will did not give a fee, there was an actual practical partition of the premises conformably to the provisions of the will, and possession taken and claim of ownership accordingly, commencing immediately on the death of the testator, and continued uninterruptedly down to the time of the commencement of this suit, a period of over fifty years. This actual partition vested the title to the lots in the children severally. (9 *John.* 270. 4 *id.* 202. 25 *Wend.* 434, 6. 7 *id.* 136. 14 *id.* 619. 4 *Comst.* 257.)

III. Assuming that the children took by descent, and thus originally were technically tenants in common of each lot, no aid can be derived to this plaintiff from this consideration, because each took possession in severalty under claim of title, and so held exclusive of all the others, and in hostility to them, and exercised all acts of ownership; as using, improving, mortgaging, selling, &c. and thus there was, what was equivalent to an actual ouster of the co-tenants. There were acts in abundance "amounting to a total denial of the rights of the other co-tenants." (*See* 2 *R. S.* 306, 307, § 27, 1*st ed.*) A conveyance by one co-tenant of the whole estate is an ouster of his co-tenants, and a good foundation for a claim of adverse possession in the grantee. (13 *John.* 406. 9 *Cowen*, 530. 4 *Paige.* 178. 15 *Wend.* 111.)

IV. As to lot 136, all claim of this plaintiff, (his claim being solely as heir of Barbara,) is barred by Barbara's mortgages, followed up by foreclosure and sale, and a master's deed in 1824, vesting the whole title in the grantee in that deed, and under that grantee we claim.

V. As to both lots, 137 and 136, to say nothing of the adverse possession by Jacob himself, of lot 137, the testimony is clear, that an actual adverse possession by the grantees of Jacob, (as to 137,) commenced as early as 1823, and by the grantees of Barbara (as to 136,) commenced as early as 1824, and that from those years down to the present time, both lots have been actually possessed, and held under claim of title adversely to Barbara and her heirs. The plaintiff as above stated, claims only as heir of Barbara, and can recover only on her title. She died in 1835, and this suit was commenced in 1852. Admitting that the 25 years, (and not the 20 years) limitation applies to this case, it expired as to both lots certainly, as early as 1849; and assuming that Barbara was under the disability of coverture when the statute commenced running, the 10 years allowed to her representatives, after the termination of that disability by her death, in 1835, expired in 1845, and if it is conceded that the 10 years did not commence quoad her representatives til. the termination of her husband's estate by the curtesy, still

that period, (the 10 years) expired in 1849, he having died in 1839. There is then no mode of escape for this plaintiff from the effect of the statute of limitation. It is a conclusive bar. (2 *R. S.* 295, §§ 16, 17, 1*st ed.* *Id.* 293, § 5. *Fleming* v. *Griswold*, 3 *Hill*, 85. 4 *Denio*, 201. 2 *Barb. Ch. R.* 314.)

VI. No benefit can arise to this plaintiff in consequence of the life estate given to the widow by the will; she conveyed this to Jacob in 1823, and his death in that year terminated that estate, assuming it not to have been otherwise extinguished. The conveyance to Jacob extinguished the particular estate *pro tanto*. It was merged. By his conveyance to Sivalls and Cook it became merged in those lots. (4 *Kent's Com.* 100, 7*th ed.* 103.)

VII. This action being the substitute for a writ of right, the plaintiff is bound to show an actual seisin or possession, or pernancy of the rents and profits within 25 years before suit brought. This he has failed to do; and indeed the contrary is clearly shown. But it is proper to say that this position may not be tenable in view of 2 R. S. 293, § 8, 1st ed.

VIII. Assuming the truth of the testimony of the plaintiff's attorney, this claim is one on which every court will look with the greatest disfavor, and will enforce only from the sternest necessity.

*By the Court*, CLERKE J. I am of opinion that the judgment in this case should be affirmed, with costs, for the reasons stated by the judge at special term.

Judgment affirmed.

[NEW YORK GENERAL TERM, May 7, 1855. *Mitchell, Clerke* and *Cowles* Justices.]

## Higgins *vs.* Whitson and Willetts, ex'rs, &c. and others.

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26h 598

On the 25th of July, 1838, C. made a general assignment of all his property to W. and N., in trust to sell and convey so much real estate as should be sufficient to pay his debts, and to apply the rents and profits to his support during life. C. was infirm and in debt, and incapable of managing his own affairs at the time of making the assignment. The trustees subsequently sold a portion of the assigned property, called "the Bayside Farm," to S. W. for $15,000, with the knowledge and assent of C., the assignor, and executed a deed to him, in which C. joined. No part of the purchase money was paid, but the purchaser gave his bond for the amount, payable at a future day. The debts not exceeding $80,000, C. consented to the sale only on condition that the trustees could find an opportunity to invest the surplus remaining after paying the debts. The trustees accordingly loaned to H. $6000 upon real estate at Newburgh, which sum S. W. consented to advance towards the purchase money, before he obtained possession. The property mortgaged by H. was subject to a prior mortgage of $4000, and was valued at $16,000. C. knew of, and consented to, this loan to H. Subsequently C. died, and the trustees delivered over to B. W. S., his executor, the bond and mortgage taken from H. The executor took no measures to enforce the payment of the interest, or the principal, from H. The prior mortgage was foreclosed, and after satisfying the same, there was a surplus of $4956.84, which B. W. S. applied for, and obtained, upon H.'s bond and mortgage; leaving due, for principal and interest, to the estate of C. $2502.73; for which a decree in chancery was obtained against H., which still remained due and unpaid. In an action brought by the devisees of C. against the trustees, to recover the amount of that deficiency from them; *Held*, that the trustees had not been guilty of any dereliction of duty, either in selling the property, or in loaning the money to H.; and that consequently they were not liable for the loss which had occurred.

It cannot be expected from trustees that they should act upon principles different from those which actuate cautious and prudent men in the transaction of their own affairs. Otherwise, the office of a trustee would be one of such hazardous responsibility that no prudent or competent man would ever accept it. Per Clerke, J.

IN EQUITY. This action was brought by Susan Higgins and Ann Higgins, an infant, now deceased, by her next friend, the said Susan Higgins, in the late court of chancery, before the chancellor, against John Nostrand, Thomas Whitson and Edmund Willetts, executors of Thomas Whitson, deceased, and Benjamin W. Strong, executor of the last will and testament of Charles P. Cornwall, late of the town of Flushing, de-

ceased, to recover certain moneys alleged by the complainants to have been lost by the negligent or fraudulent acts of the said John Nostrand and Thomas Whitson, deceased, while acting as trustees of the said Charles P. Cornwall. The bill was filed by the complainants as devisees of the said Charles P. Cornwall. The bill of complaint was filed on the 11th day of May, 1847. All the defendants, except the said Benjamin W. Strong, appeared, and put in answers to the bill of complaint. The answers were filed September 1st, 1847. The bill was taken as confessed by the said Benjamin W. Strong, for want of an appearance. The said Benjamin W. Strong departed this life in the month of September, 1847. Replications to the answers were filed October 2d, 1847. The complainants filed their bill of revivor and supplement in the supreme court in equity, September 23d, 1848, against the said defendants, who had appeared and answered the original bill, whereby this action was revived against the said Daniel T. Smith, as the administrator with the will annexed, of the said Charles P. Cornwall, deceased, and who was made a defendant therein. The defendants, Nostrand, Whitson and Willetts, appeared and filed their answers to the bill of revivor and supplement on the 31st day of October, 1848. Replications thereto were filed November 6th, 1848. Said bill was taken as confessed against the defendant, Daniel T. Smith, for want of an appearance. The cause was at issue on the pleadings, November 27, 1848. Testimony in the cause was taken by consent of parties, complainants and defendants, before John P. Rolfe, Esq. and William Templeton Johnson, Esq. referees duly appointed for that purpose. The cause was heard and tried in December, 1852, before Philo T. Ruggles, Esq. as sole referee, therein duly appointed by an order of this court, bearing date September 6th, 1852, upon the pleadings and proofs taken before said referees. The said Philo T. Ruggles, as such referee, made his decision and report herein, bearing date January 27th, 1853, in favor of the respondents, and against the said appellants, John Nostrand, Thomas Whitson and Edmund Willetts, executors as aforesaid. That report was filed with the clerk of this court on the 30th day of March, 1853,

and thereupon judgment was rendered in favor of the complainants against the defendants in the sum of $3904.25, with interest from the 27th day of January, 1853, besides their costs in this action to be taxed; from which judgment Nostrand, Whitson and Willetts duly appealed to the general term of this court, on the 15th day of April, 1853.

*H. B. Cowles* and *John A. Lott*, for the appellants.

*G. T. Strong* and *M. S. Bidwell*, for the respondents.

CLERKE, J. Charles P. Cornwall, now deceased, made a general aasignment, dated 25th of July, 1838, to Thomas Whitson, deceased, and John Nostrand, in trust to sell and convey so much real estate as should be sufficient to pay his debts, and to lease any part of the land, and apply the rents and profits to his support during life. Cornwall was infirm, and in debt; ana being incapable from bad health of attending efficiently to his affairs, he placed his property under the control of two neighbors, Whitson and Nostrand, who seem to have been actuated by kind and disinterested motives in accepting this trust. The land which was assigned consisted of several tracts in Queens county; that called "the Bayside Farm," was the most valuable—its value considerably exceeding the whole indebtedness of Cornwall.

The trustees made efforts to sell other portions of the estate; but, notwithstanding strenuous and faithful exertions, they failed in this attempt; and, at last, having received an offer from Samuel Willetts, of the city of New York, a man of wealth and high credit, for the Bayside Farm, for the sum of $15,000, they sold it to him for this sum. This was done with the full knowledge and consent of Cornwall. The trustees executed a deed to Willetts about the 23d of November, 1838, in which Cornwall joined. Willetts did not then pay any part of the purchase money, but gave to the trustees his personal obligation, without security, to pay the amount on the 1st of April, 1840, or on the 1st of April, 1839, in case possession of the premises

should be given before that time. It having been ascertained that the debts did not exceed $8000, and Cornwall, before he consented to the sale to Willetts, having expressly stated that he would not be willing to sell the Bayside Farm, unless the trustees could find an investment for the surplus after paying the debts, they received an application for a loan of $6000, from Elisha Hall, of Newburgh. Mr. Cornwall consented to this loan; and, as Willetts was willing to advance this amount of the purchase money of the Bayside Farm, before he received possession, they had the title to Hall's property examined, and found it to correspond with his representations. This security was estimated at $16,000. There was one mortgage on it for $4000, besides judgment liens. The latter were paid off on the day the trustees made the loan, leaving the $4000 to remain as a prior incumbrance. It does not appear satisfactorily that Cornwall was aware of the first mortgage; but he expressed a preference for a farm in the country to property in the city of New York, confiding in the judgment and integrity of the trustees, especially Mr. Whitson, who took the most active part in this business. About the 26th of November, 1838, Hall executed the bond and mortgage to the trustees, payable on the 1st of May, 1840.

Cornwall died on the 4th of February, 1839; and soon after his death, the trustees delivered over to Benjamin W. Strong, his executor, the security in question without an assignment in writing. No interest money on this security was in arrear at this time; and, *after it came into the hands of the executor*, it continued to be regularly paid, until the 1st of May, 1841, some time after the principal became due. After this time no interest was paid on this or the prior mortgage, until the foreclosure of the latter in 1844. Strong, the executor, took no measures to enforce the payment of the interest or the principal. After satisfying the first mortgage, the surplus remaining was $4936.84, which Strong as executor applied for and obtained upon the bond and mortgage of Hall to the trustees, leaving due for principal and interest, the sum of $2502.73, for which a de-

cree in chancery was obtained against Hall on the 21st October, 1844, and which is still due and unpaid.

This action is brought to recover the deficiency, from the trustees. Have they been guilty of any dereliction of duty either in selling the property, or in lending the money to Hall? This may be considered rather an agency, than a trust in the ordinary or technical sense. The fiduciary estates, for which the stringent rules of courts of equity have been particularly intended, and to which their vigilance has been directed, are not those in which the grantor and *cestui que trust* are one and the same person, retaining and exercising control over the property. In the present case the grantor, at all events, at any time after the payment of the debts, could revoke the authority of the trustees, and rescind the conveyance, as to its prospective effect. Indeed this instrument differs, practically, very little, if at all, from a power of attorney, executed by a person in the place where the duties of the attorney are to be performed, and where the property is situated. Temporary convenience seemed to be the motive of the grantor in executing this instrument; he was infirm physically, necessarily confined to his house; and two of his friends, immediate neighbours, kindly undertook to manage his affairs, for the purpose of extricating his property from debt, and relieving his mind from anxiety and trouble. No other motive whatever seems to have influenced the minds of any of the parties to this instrument. If it can be called a trust in the technical sense, there was no *cestui que trust* but Mr. Cornwall himself. He was, no doubt, a man of intemperate habits; and his mind like that of every person who is addicted to such habits, was to some extent impaired; but not in such a degree, as to render him incapable of comprehending his own interest, and of deciding, as correctly as the generality of men, upon the subjects in relation to which he was consulted by the trustees. His preference for farms, over city property, differs from the opinion of most well informed and shrewd capitalists; but, it may, nevertheless, be well doubted, whether a farm, situated in a populous neighborhood and near several great thoroughfares, is not safer for a permanent investment than any

city property. The value of real estate fluctuates wonderfully in a city like New York, and even in the oldest cities. A street which may be this year the mart of business, or the most fashionable locality for private residences, may in ten years fall into disrepute, and depreciate more than one-half in value. There are numerous instances of this in the history of New York; we have all been witnesses of such within the last twenty years. An article in Household Words for May, entitled "Gone to the dogs," shows, in an interesting manner, how an entire street in the great British metropolis often falls into decay within a few years—how it "goes to the dogs."

Some portion of the evidence undoubtedly shows that Cornwall was a man of "low mental capacity;" but this does not prove that his assent to the acts of the trustees was not given freely and intelligently. He died on the 4th of February, 1839; Haughworth lived with him for four months previous to and until his death; and he states, positively, that "Cornwall could converse with Mr. Miller or any body else, as well as any person, before his last illness." The investment was made in Nov. 1838. But even if his mental feebleness may be deemed so great as to leave him at the mercy of every designing person, did the trustees, in fact, take advantage of his weakness, and for any sinister purpose of their own or of others, betray the confidence which he had reposed in them? I cannot find a particle of evidence to warrant any conclusion of this kind. I cannot even perceive that there was any thing equivocal in their conduct; nor can I find any proof of such neglect or mismanagement as to warrant this court in making them responsible for any deterioration in the security, in which a part of the purchase money of Bayside Farm was invested. I do not think that we could do so without a palpable violation of all equitable principles, even if they were trustees in the most technical sense, and they were acting for married women, or infants, or persons totally incapable of judging for themselves. It cannot be expected from trustees, that they are to act upon principles different from those which actuate cautious and prudent men in the transaction of their own affairs. Otherwise, the office of

trustee would be one of such hazardous responsibility that no prudent or competent man would ever accept it. The mere circumstance that the security given by Hale was a second mortgage, is no proof of neglect or mismanagement on the part of the trustees. The property was valued at $16,000 by persons whom they deemed competent; it was in a rich and populous neighborhood, advantageously situated, with a greater probability of improvement than of depreciation; and the first mortgage was only $4000. Cornwall was consulted relative to this investment, and as he preferred country to city security, he readily gave his assent; although it does not appear expressly, that he was at the time informed that there was a prior mortgage on the farm. But we are not to presume that this was designedly concealed from him, or that it was concealed at all. We have as much reason to infer from the attendant circumstances, and from the general conduct of the trustees in relation to this matter, that it was communicated to him, as that it was suppressed. When we further consider that the deficiency for which this action is brought, was caused by the want of diligence on the part of Mr. Strong, the executor of Cornwall, to whom the whole management of the affair was transferred by the trustees, and who assumed the control over it, we can no longer entertain any doubt on the subject.

The report of the referee should be set aside, and the judgment reversed, with costs.

COWLES, J. I concur in the opinion that the judgment should be *reversed*. Upon the facts the defendants should have had judgment; and as all the facts in the case are evidently before the court, there can be no good reason, as far as I can perceive, for sending the parties again before the referee.

The clerk will enter an order reversing the judgment, with costs.

MITCHELL, P. J. concurred.

Judgment reversed.

[NEW YORK GENERAL TERM, May 7, 1855. *Mitchell, Clerke* and *Cowles*, Justices.]

20 148
1L 412
17a 281
21a 150
89a 399

## OLCOTT *vs.* ROBINSON.

The statute is imperative in requiring the time and place of holding any sale of real estate on execution to be publicly advertised six weeks *previously*, in two ways; first by posting the notice in three public places in the town, and second, by printing the same once in each week, in a newspaper of the county. Both methods must commence six weeks *previous* to the day of sale. A less time, in respect to either branch, is insufficient, and renders the sale invalid.

Where a notice of sale was posted forty-three days previous to the day of sale, making six full weeks, but the notice published in the newspapers, although it received six separate insertions, once in each week for six successive weeks, was first published only thirty-nine days *previous* to the day of sale; *it was held* that the publication was insufficient; and that the sheriff's deed, executed upon the sale, gave no title to the purchaser.

*Held also*, that the circulation of the notice of sale in slips headed "Plattsburgh Republican, Extra," would not aid the purchaser; that not being such a printing in a newspaper as was contemplated by the statute.

THIS was an action in the nature of ejectment to recover the possession of the north half of Valcour Island, situate in Lake Champlain, in the county of Clinton. The cause was tried in July, 1854, and a verdict taken for the plaintiffs, subject to the opinion of the court at general term.

The plaintiff claimed title by virtue of a deed received from the sheriff of Clinton county, on a sale of the premises under an execution issued upon a judgment rendered against Peter Comstock, docketed May 9, 1840. The defendant claimed through the same source, by virtue of a sale upon a junior judgment. The plaintiff's title was contested, solely, on the ground that the requirements of the statute, relative to sales of real estate under execution, had not been fully complied with. The proof showed that the notices of sale were properly posted on Tuesday, the 26th day of March, 1850, for Wednesday, May 8th, 1850, but that no copy of said notice was published in a newspaper until Saturday, March 30, which was continued regularly for the next five succeeding Saturdays, ending May 4. Also that a few slips, containing a copy of the notice of sale, headed "Plattsburgh Republican, Extra," were printed and circulated, on the 26th day of March and on the 8th of May.

*G. Stow*, for the plaintiff.

*Wm. Sweatland*, for the defendant.

*By the Court* JAMES, J. The validity of the judgment under which the plaintiff makes title to the premises in question, the regularity of the execution issued thereon, and all proceedings under it, except the publication of the notice of sale, are not disputed; so that the only question presented for consideration is, whether in the publication of the notice of sale under the execution, the requirements of the statute have been sufficiently complied with to vest in the plaintiff title to the premises in dispute. The statute is in substance as follows: "The time and place of holding any sale of real estate pursuant to any execution, shall be publicly advertised, *previously*, for six weeks successively, as follows: First. A written or printed notice thereof shall be fastened up in three public places in the town, &c. Second. A copy of such notice shall be printed once in each week in a newspaper of such county, &c. (2 *R. S.* 368, § 34.) In the present case notice was posted, &c. forty-three days *previous* to the day of sale, making six full weeks; but the notice published in the newspaper, although it received six separate insertions, once in each week for six successive weeks, was first published only thirty-nine days *previous* to the day of sale. This publication the defendant insists is insufficient, and a defect, fatal to the validity of the deed taken under it; while the plaintiff insists that all the requirements of the statute were fully and literally complied with, and the title acquired by virtue of such sale complete in the purchaser.

I am nowever compelled to differ with the plaintiff in his view of the case. The statute is imperative. It requires the time and place of holding any sale of real estate on execution to be publicly advertised six weeks *previously*, in two ways; both should commence six weeks *previous* to the day of sale; a less time is expressly prohibited, and the prohibition is as much applicable to one branch of advertising as the other. If both are not complied with, the sale must of necessity be invalid It is

an old maxim of the law, that "every statute authority to divest the title of one without his consent and transfer it to another, must be strictly pursued, or the title will not pass." That not having been done in this case, the sheriff's deed gave no title to the plaintiff in the premises in dispute.

It is insisted that such a construction will make seven insertions of the notice in the newspaper necessary to the validity of a sale under execution, by reason of the rule of computation which excludes the first day. But that would not necessarily follow. The first publication is the beginning of the act, and although the day on which the act was done might be excluded in the computation of the time, if the notice is published six times, once in each week, reckoning the first publication as one, that would be sufficient, without a seventh publication on the day of sale. This construction harmonizes all the provisions of section 34; the property is advertised *previous* to the sale, by both posting and publication, six full weeks; and also by a publication once in each of the six weeks; thus fulfilling both the letter and spirit of the statute.

If however, from the language of the statute, a seventh publication were necessary to give validity to a sheriff's sale, the statute must be obeyed without regard to its effect upon particular cases.

The circulation of the notice of sale in the slips headed "Plattsburgh Republican, Extra," will not aid the plaintiff. It was not such a printing in a newspaper as was contemplated by the statute.

There must be judgment for the defendant.

[Essex General Term, July 2, 1855. *C. L. Allen, Bockes* and *James*, Justices.]

## INGRAHAM *vs.* GILBERT.

20 151
34 525
3L 126
26a 611

Section 27? of the code does not require a referee formally to report on all the issues formed by the pleadings. If there are issues upon which no evidence is given, he need not notice them in his report; *it seems.*

An objection to the report, on that ground, is not available on appeal from the judgment entered upon the report. If a party is dissatisfied with the report of a referee, his remedy is by special motion to set aside or correct the same.

If a person, without compulsion of law, or legal obligation, pays the debt of another, without a previous request, the debtor is not liable for the amount.

A pecuniary benefit, voluntarily conferred by the plaintiff and adopted by the defendant, is not such a consideration as will support an action of assumpsit, on a subsequent implied promise.

THIS action was brought to recover money paid by the plaintiff on a debt due from the defendant to one Baker. The complaint alleged that the defendant was indebted to one Baker in the sum of $195; that the defendant requested the plaintiff to adjust the same, and for that purpose the plaintiff sold to said Baker one yoke of oxen at $60, and paid him $134.85 in money. That since said payment the plaintiff had repeatedly requested the defendant to repay him the same, but the defendant had wholly neglected and refused so to do; whereby, &c.

The answer denied the complaint, and denied that Gilbert made any request to the plaintiff, either to deliver the cattle or to pay his debt.

The cause was referred, and after hearing, the referee reported in favor of the plaintiff, upon which report judgment was entered. In his finding of facts, the referee made no allusion to a request by the defendant, but reported that "in 1844 the defendant was indebted to Baker in the sum of $194.85; that the plaintiff paid and satisfied such debt; that afterward the defendant sanctioned and adopted such payment, and promised to repay the same to the plaintiff."

*C. S. Grinnell*, for the plaintiff.

*Wm. Wait*, for the defendant.

*By the Court*, JAMES, J. The defendant's first ground of error is, that the referee neglected to report upon all the issues made by the pleadings. The code, § 272, requires the referee to state the facts found, and his conclusions of law thereon, separately. This is in the nature of a special verdict, and enables the court, on appeal, to declare readily, whether or not the referee erred in the application of the law to the facts. In this action the plaintiff averred that he paid the debt to Baker at the defendant's request, and as the averment was specially denied by the answer, the defendant insists it became a material issue upon which the referee should have directly reported. But I do not understand that section 272 requires the referee formally to report on all the issues formed by the pleadings. If there are issues upon which no evidence is given, he need not notice them in his report. However that may be, the objection is not available on this motion. If dissatisfied with the report, the defendant's remedy was by special motion to set aside or correct. The allegation of request was only important as a rule of pleading. In declaring upon an indebtedness for past service, it is necessary that the service be averred to have been performed upon request; otherwise, from all that would appear upon the record, it may have been a voluntary courtesy. (*Comstock* v. *Smith*, 7 *John.* 87. 6 *Wend.* 647.) And such averment, like other issues, may be sustained by evidence from which a request might be implied. On the trial the plaintiff did not seek to prove any previous express request, and aside from the beneficial nature of the transaction, there was nothing from which a request could be implied. From these facts, and from the further fact that this issue was urged upon the referee at the hearing, and his omission to find a previous request, this case must be considered as if none such was made, and that the payment was a voluntary act. If one person, without compulsion of law, or legal obligation, pay the debt of another, without a previous request, the debtor is not liable for the amount thus paid. (*Bartholomew* v. *Jackson*, 20 *John.* 28. *Dunbar* v. *Williams*, 10 *id.* 259.)

But the plaintiff insists that the defendant has made himself

liable by his subsequent sanction and adoption of the payment and promise to repay, as found by the referee. This presents two questions: 1st. Was the finding of the referee warranted by the evidence? and 2d. Was there a legal consideration to uphold and support such promise?

In the case itself, there is no proof to sustain the finding of the referee. All the evidence upon this branch of the case was from Levi and Daniel C. Ingraham and D. W. Johnson. The first named witness testified that in June, 1849, in a conversation with the defendant about his ability to construct a fence, he said he owed the plaintiff near $300 on the Barker matter. The third witness was present and heard the same conversation. The second witness testified that the defendant, in 1848, in enumerating his debts to him, mentioned one due to the plaintiff for money paid to Baker; that the defendant once proposed to this witness that the plaintiff and another person should buy a store of him, and that it would nearly pay the Baker debt. The plaintiff was not present at either conversation. The most that could be made from this evidence was an implied adoption of the payment and promise to pay. (*Sands* v. *Gelston*, 15 *John.* 511.)

To avoid the question of consideration, the plaintiff insists that an implied promise is equivalent to a previous request. There is no case which quite sustains that position, although *Doty* v. *Wilson*, (14 *John.* 378,) comes very near to it. There the plaintiff, a sheriff, having arrested the defendant on a *ca. sa*, suffered him to escape, and was compelled to pay the judgment; the defendant afterwards promised to pay the amount; and it was held the sheriff could recover on the promise. Thompson, chief justice, said: "When a man pays a sum of money for me without my request, and I *afterwards agree to the payment*, this is equivalent to a previous request to do so. The benefit to the defendant, connected with his *express promise* to pay, must be deemed equivalent to a previous request. It was an adoption of the payment as made for the benefit of the defendant, and a subsequent ratification was equivalent to an original command." The reasons why a debtor is not liable to

repay to another a debt which that other has voluntarily paid entirely fail, when such debtor afterward agrees to the payment and promises to remunerate him for what he has done. It would seem like the subsequent ratification of the act of a voluntary agent, done without authority. If the promise in this case had been an express promise, and the finding of the referee "that the defendant had sanctioned and adopted the act," justified by the evidence, it would come within the reason and spirit of the decision in *Doty* v. *Wilson*. But as I have already shown, the proof falls far short of sustaining the report, or of showing an express promise. The plaintiff's right to recover, therefore, rests upon the defendant's implied promise to repay.

Was there any consideration to support such promise? The language of the note to 3*d Bos. & Pul.* 249, was adopted in this state as early as 1816, in *Smith* v. *Ware*, (13 *John.* 257,) which holds "that an express promise can only revive a precedent good consideration which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statutory provision." In this state "a moral obligation to pay money, or perform a duty, is a good consideration for a promise to do so, where there was originally an obligation to pay the money, or do the duty, enforceable at law but for the interference of some rule of law. Thus a promise to pay a debt contracted during infancy, or barred by the statute of limitations, or bankruptcy, is good without other consideration than the legal obligation. But the morality of the promise, however certain, or the duty nowever urgent, does not of itself suffice for a consideration." (1 *Parsons' Contracts*, 360. *Ehle* v. *Judson*, 24 *Wend.* 97. *Geer* v. *Archer*, 2 *Barb. S. C. Rep.* 420. *Chilcott* v. *Trimble*, 13 *id.* 508.) The English cases are still more explicit. The rule in *Eastwood* v. *Kenyon*, (11 *Ad. & Ellis*, 438,) is decisive of this case. It is there held that "a pecuniary benefit voluntarily conferred by

the plaintiff and adopted by the defendant, is not such a consideration as will support an action of assumpsit on a subsequent express promise." The plaintiff's act was of that character, and hence there was no consideration to support the promise upon which he relies. Unless, therefore, the plaintiff can prove an express or an implied request to pay the debt, he seems to be remediless. "The law as it now stands, amounts to little more than permission to a party to waive certain positive rules of law, which would protect him from a plaintiff claiming a just debt."

Judgment reversed and new trial ordered; costs to abide the event.

[Essex General Term, July 2, 1855. *Hand*, *Cady*, *C. L. Allen* and *James*, Justices.]

## The Eastern Plank Road Company *vs.* Vaughan.

20 155
32 621
14a 546

In an action by a plank road company, the plaintiffs, to establish their incorporation, proved that notice of opening the books of subscription as required by the laws of 1847 was properly given; that stock to the amount of over $500 per mile was subscribed to the original articles of association; that directors were elected, on due notice; that articles of association were subscribed, as required by the act, and indorsed by an affidavit of three directors, and duly filed in the office of the secretary of state; also that the plaintiffs had, under their organization constructed the road and put the same in operation. *Held* that the plaintiffs had proved themselves to be a corporation.

The defendant, among others, signed a paper by which the subscribers, for value received, promised to pay B. and W. $100 for each share by them subscribed for the purpose of building a certain plank road. And B. and W. were authorized to transfer the subscriptions to a company thereafter to be formed for the purpose of building said road. The defendant took one share. Subsequently articles of association were adopted and signed by subscribers for stock, to an amount exceeding the sum required by statute, without including the defendant; and the organization was completed by filing the articles of association, and the subscription signed by the defendant and others was transferred to the company by B. & W. and the defendant's name was subscribed to the books by them.

Eastern Plank Road Co. *v.* Vaughan.

*Held* 1. That the subscription of the defendant was legal, and binding upon him; as much so as if he had subscribed the articles of association with his own hand.

2. That the subscription was legally transferred to the plaintiffs; and that such transfer vested in them the title to such subscription, and the authority to collect and receive the moneys due or to become due under it.

3. That the promise of the defendant purporting to have been made for value received, this was *prima facie* sufficient evidence of a consideration to uphold the subscription.

4. That the agreement might be regarded as an offer or proposition on the part of the subscribers that, provided a company should be organized to construct the plank road mentioned, each would take the number of shares of capital stock, therein, by them subscribed, and the organization of such corporation as an acceptance of that offer or proposition. And that such promise could be enforced, because it induced others to enter into engagements, assume liabilities, and incur expense, on the faith of such proposition.

By the articles of association of a plank road company, executed in Sept. 1850, the subscribers promised to pay in their subscriptions as called for by the directors, not exceeding 25 per cent at any one time. On the 25th of March, 1851, a call of 13 per cent was made, payable April 15th, and calls of 15 per cent each, payable May 1st, May 15th, and June 1st; and on the 13th of June a call for the balance, 42 per cent, payable on the 1st of July, was made; notice of which calls was immediately given to the defendant.

*Held* 1. That calls in sums not exceeding 25 per cent payable at any one time, were necessary, by the terms of the defendant's agreement, before any liability thereon accrued.

2. That the 39th section of the plank road law of 1847 had no application to a common law action, brought to recover the amount of the calls; and that 30 days previous notice of the calls was not requisite to the defendant's liability in such action. That notice is necessary only where the cumulative remedy of forfeiture of the stock is sought.

3. That the call for the first four installments was a compliance, on the plaintiff's part, with the defendant's agreement to pay; but that the call for 42 per cent, being for a sum greater than he had contracted to pay at any one time, imposed no liability on him.

4. That the defendant had a right to waive the call for installments in sums not exceeding 25 per cent; and that no objection being raised, either in the answer, or on the trial, to the plaintiff's right to recover, on that ground, the right to object must be deemed to have been waived.

5. That it was not requisite that the 5 per cent should be paid on the defendant's subscription, to make it valid and binding upon him; the corporation being created without his stock.

The second section of the act of 1847 only requires five per cent to be paid in on the stock relied upon as a basis to create the corporation.

The forfeiture of stock, authorized by the 39th section of that act, in case of

non-payment of calls, is a cumulative remedy, and can only be pursued on a full compliance with the requirements of the act.

Where subscribers agree to pay the amount of their subscriptions, at such times and in such manner as shall be required by the board of directors, as soon as the board makes the requirement the obligations of the subscribers become operative, without the notice of 30 days mentioned in the 39th section of the plank road act.

That notice is to be regarded as preliminary only to a right to forfeit the stock.

THIS action was brought to recover an alleged subscription to the capital stock of the plaintiffs' corporation. The cause was tried in 1853, and judgment rendered for the plaintiffs for the full amount claimed. In January, 1850, the defendant and certain other persons subscribed the following paper: "We, the subscribers, for value received, promise to pay John H. Boyd and Isaac Wood, $100, for each share by us subscribed and set opposite our respective names, for the purpose of building a plank road from the Whitehall and Granville Turnpike to the road running north and south past the Methodist church; and that said Boyd and Wood shall have the right and we hereby authorize them to transfer our subscription to a company hereafter to be formed for the purpose of building said road." The defendant took one share. In September of the same year the articles of association were adopted and signed by subscribers for stock, to an amount exceeding the sum required by statute without including the defendant, and in November the organization was completed by filing the articles of association, properly verified, in the office of the secretary of state. By the articles of organization, the subscribers promise to pay in their subscriptions as called for by the directors, not exceeding 25 per cent at any one time. The subscription of January previous, signed by the defendant and others, was transferred to the plaintiffs by Boyd and Wood. After the organization and transfer of subscription, the corporation completed the road and the same is now in operation. On the 25th of March, 1851, a call for payment on the subscriptions to stock was made, of 13 per cent, payable April 15th, and further payments of 15 per cent each, payable May 1st, May 15th and June 1st; and on the 13th of June a call for the balance was made, pay-

able on the 1st of July. Notice of those calls was immediately given to the defendant, and a personal demand made for his subscription, which was refused. There was no proof of the payment of five per cent at the time of the subscription, or at any other time.

*Joseph Potter*, for the plaintiffs.

*Robert Doig*, for the defendant.

*By the Court*, JAMES, J. The defendant insists that the judgment entered in this action is erroneous, and that the same should be set aside and a new trial granted. 1st. Because the plaintiffs did not prove themselves a corporation; 2d. Because the alleged subscription was void; 3d. Because the alleged subscription was never legally transferred; 4th. Because there was never any valid call for the subscription; and, 5th. Because the complaint is on an absolute subscription for stock, while the contract shows an executory agreement to take stock.

To establish the plaintiffs' incorporation the proof showed that notice of opening the books of subscription, as required by the laws of 1847, was properly given; that stock to over $500 per mile was subscribed to the original articles of association; the election of directors on due notice; articles of association, subscribed as required by the act, indorsed by an affidavit of three directors, and duly filed in the secretary of state's office. The justice who tried the cause also found, as a question of fact, that the plaintiffs, under their organization, had constructed the road, and put the same in operation, which would constitute them a corporation *de facto*, if not *de jure*, as to the defendant and all third parties. (*McFarlan* v. *The Triton Ins. Co.*, 4 *Denio*, 395. *Utica Ins. Co.* v. *Tilman*, 1 *Wend.* 555. *Fire Department* v. *Kip*, 10 *Wend.* 266. *U. S. Bank* v. *Stearns*, 15 *Wend.* 314.) Either view is a complete answer to the defendant's first objection.

As I understand the proof, the original subscription of the defendant was delivered to the plaintiffs, and the defendant's

name subscribed to the books by Boyd and Wood. If Boyd and Wood were the lawfully appointed agents of the defendant for the latter purpose, and the subscription would seem to confer that power, then such subscription in the books of the corporation is binding and obligatory upon the defendant, and he is a stockholder of the corporation to all intents and purposes, and is as much bound as though he had subscribed the articles of association with his own hand. But, whether or not Boyd and Wood were authorized to sign the defendant's name to the articles of association, they were fully authorized to transfer to the plaintiffs the subscription of January, 1850, which they did; and such transfer vested in the plaintiffs the title to such subscription, and the authority to collect and receive the moneys due, or to become due under it. Such transfer need not be evidenced by writing; a parol assignment, accompanied by a delivery of the instrument, is sufficient. (*Prescott* v. *Hull*, 17 *John. Rep.* 285.)

But, the principal question is, whether this subscription was void for want of consideration. The defendant insists that it was, and relies upon the case of *The Trustees of Hamilton College* v. *Stewart*, (1 *Com.* 582.) The substance of that case, as appears from the opinion of Judge Gardiner, who pronounced the decision of the court, was, that the agreement upon which the action was brought, contained no undertaking on the part of the corporation, its trustees, or agents, as a consideration for the defendant's promise; it expressed no consideration, and was, therefore, without mutuality, or consideration, to uphold it; that the agreement contained no express request to the plaintiffs, their agents, or others, to perform any services, in consideration of which the defendant promised to pay his subscription, nor could any request be implied from the beneficial nature of the service, or the object to be obtained. But it was conceded by the learned judge, that had the agreement furnished evidence of a request by the defendant to the plaintiffs to perform services, in consideration of which he promised to pay his subscription, the right of the plaintiffs to the money would have been unquestionable.

The agreement in this case is unlike the one in *Hamilton*

*College* v. *Stewart*. The promise here purports to have been made for value received; and although an attempt was made on the trial to prove the admission untrue in fact, the evidence was insufficient for that purpose, and the admission stands uncontradicted. This was *prima facie*, sufficient evidence of a consideration to uphold the subscription. (*Watson's Executors* v. *McLaren*, 19 *Wend.* 557. *Douglass* v. *Howland*, 24 *id.* 55. *Brewster* v. *Silence*, 4 *Selden*, 207.)

But I am not disposed to rest this branch of the case upon that ground alone. The agreement may be regarded as an offer or proposition, on the part of the defendant and others, that, providing a company should be organized to construct the plank road mentioned in said agreement, each would take the number of shares of capital stock therein by them subscribed, and the organization of such corporation, an acceptance of that offer or proposition. If I am right in this, such promise is susceptible of being enforced, because it induced others to enter into engagements, assume liabilities and incur expense on the faith of such proposition. (*Story on Contr.* § 453. 12 *Mass. Rep.* 190. 14 *id.* 172. 6 *Pick.* 433.)

The motives and purposes which led to this agreement are quite apparent. Boyd, Wood, the defendant, and other parties to the instrument, desired the construction of a certain plank road. To accomplish that object it was desirable to create a plank road corporation; and this agreement was executed by the parties thereto agreeing to take so many shares of stock in any company thereafter to be formed for the purpose therein mentioned, as each should set opposite his name, and empowering Boyd and Wood to transfer the same to such corporation when created. Here was an implied, if not an express request to Boyd and others to set themselves to work to create such a corporation; they did so; labor was performed, expense incurred, and obligations assumed; the corporation created and the subscription transferred. This brings the case directly within the principle recognized by Judge Gardiner in *Hamilton College* v. *Stewart*, and which is more fully recognized in

*Barnes* v. *Perine*, (9 *Barb.* 202,) and since affirmed by this court and the court of appeals. (15 *Barb.* 249.)

It was not requisite that the five per cent should be paid on the defendant's subscription to make it valid and binding upon him. The corporation was created, without this stock. The second section of the act of 1847 only requires five per cent to be paid in on the stock relied upon as a basis to create the corporation.

By the articles of association it is provided that "the capital stock shall be called in at such times and in such manner as may from time to time be determined by the board of directors;" and in the 13th article the subscribers agree to pay to the association the sum of $100 for each share subscribed, in the manner specified in the articles of association, not exceeding 25 per cent at any one time. On the facts, the case stands thus: the defendant agreed to pay his subscription of $100, in sums not exceeding $25 each, at such times as should be determined on by the board of directors; and they determined that $13 should be paid on the 15th of April; $15 on the 1st May; $15 on the 15th May; $15 on the 1st of June; and $42 on the 1st of July. 1851; of which determination the defendant had immediate notice. Unless there is some law to modify or change the effect of the agreement, the defendant was bound to pay the first four calls, amounting to $58. But the defendant insists that by virtue of the 39th section of the general plank road law of 1847, he was entitled to thirty days' notice of the payments required by the board of directors, before he was bound to pay; and that such notice was not given and could not be given as to the $13 on the 15th of April, and the $42 on the 1st of July, because thirty days did not elapse between the calls and days of payment. That such a notice was necessary before the defendant's stock could be forfeited, is clear; but the present is a common law action for the amount of the subscription, under the defendant's agreement to pay $100. The forfeiture authorized by statute (§ 39) is a cumulative remedy, and can only be pursued on a full compliance with the requirements of the act by which it is given. In the case of the *Troy and Boston Rail Road*

*Co.* v. *Tibbits*, (18 *Barb.* 297, 300,) Justice Wright remarks, that "it seems to be well settled that the obligation of actual payment is created by a subscription to a capital stock, unless plainly excluded by the terms of the subscription." In this case the agreement was to pay $100 as required by the board of directors, in sums not exceeding $25 at any one time. The board made the requirement, and the obligation of the defendant became operative, without the notice of thirty days mentioned in the 39th section of the plank road act, which notice must be regarded as preliminary only to a right to forfeit the stock. (*The N. R. R. Co.* v. *Miller*, (10 *Barb.* 260, 270, 271.) In the *Goshen and Minisink Turnp. Co.* v. *Hurtin*, (9 *John.* 217,) the action was on a promissory note by which the defendant promised to pay "in such manner and proportions and at such time and place, as the said plaintiff should from time to time require." The court remarked that the note was payable absolutely, not depending on any contingency; and there was also, in that case, a provision for forfeiture, as in this case. Several of the cases cited in the *Northern R. R. Co.* v. *Miller*, (*supra*,) bear on the question under discussion; although in most of them the point was whether the common law remedy was retained in those cases where the statute provided for a forfeiture. In the *Schenectady and Saratoga Plank Road Co.* v. *Thatcher*, (1 *Kernan*, 102,) Justice Johnson, in delivering the opinion of the court, assumes the necessity of notice to the subscriber before action for the subscription; but the point determined by the learned judge was that the evidence in that case established the fact that notice was given. It does not appear that this question was considered by the court; and until we have a decision from the court, directly on the point, it should not be assumed that that court intended to reverse or disregard a long list of well considered cases. The dictum in *Small* v. *The Herkimer Man. Co.*, (2 *Com.* 330,) if entitled to weight, concludes this question. In that case Small agreed to pay "at such times and in such proportions as the same shall be required by the said directors." Justice Gardiner, at page 335, remarks, "I agree with that learned court that the plaintiffs had a remedy

by action; that the debt of the defendant, created by his subscription, was entire; the calls made by the company merely ascertaining the amount and the times when the installments of the debt should be paid." See also the opinion of Justice Jewett, who dissented in this case, but on a point distinct from this under consideration. The case in 1 *Kernan* cannot be regarded as an authority in the defendant's favor.

In my judgment the defendant was liable on the first of the four calls of the board of directors, without the notice mentioned in section 39 of the act. There can be no question as to the 2d, 3d and 4th calls, as for those 30 days' notice was given.

As to the call of June 13, of 42 per cent, a question remains. Although the defendant was not entitled to 30 days' notice, still his promise to pay was not absolute. He did not agree to pay at once, but in sums not exceeding twenty per cent at any one time, and at such times as should be determined by the board of directors. Action by the board was preliminary and was a condition precedent to his obligation to pay; that action was the call for payment; and in this respect the case differs from the *Goshen and Minisink Turnp. Co.* v. *Hurtin*, (*supra*,) where the promise was to pay as the company should require; which made the debt due on demand, and the action was a demand. This call was made, but it was for a sum exceeding the amount which they had a right to demand at any one time, and therefore no liability was created by the call, and the defendant was not bound to pay, if that was all there was in the case. But the defendant put himself upon no such ground, either in his answer or upon the trial; and must therefore be deemed to have waived that point. (*Potter* v. *Deyo*, 19 *Wend.* 361. *Gillett* v. *Campbell*, 1 *Denio*, 520. *Jencks* v. *Smith*, 1 *Comst.* 90, *and cases there cited.*) If the objection had been made at the trial, the plaintiffs might have obviated it, by proving calls covering the entire subscription for sums not exceeding 25 per cent each.

I am also of the opinion that the complaint is properly drawn, but admitting that it alone counted upon an absolute subscription, in one view I have taken of this case, such counting would be proper.

Upon the whole case I have arrived at the following conclusions:

1. That the plaintiffs proved themselves a corporation.

2. That the alleged subscription was legal and binding.

3. That such subscription was legally transferred to the plaintiffs.

4. That calls in sums not exceeding 25 per cent payable at any one time, were necessary, by the terms of the defendant's agreement, before any liability thereon accrued.

5. That this being a common law action, 30 days' previous notice of the calls was not requisite to the defendant's liability; in other words, the 39th section of the plank road law of 1847 has no application to this action.

6. That the call for the first four installments was a compliance on the plaintiffs' part with the defendant's agreement to pay; but that the call for 42 per cent, being for a sum greater than he had contracted to pay at any one time, imposed no liabllity on him.

7. That the defendant had a right to waive the call, for installments in sums of not exceeding 25 per cent; and that no objection being raised either in the answer or on the trial to the plaintiff's right to recover, on that ground, that objection must now be deemed to have been waived.

Judgment affirmed.

[Essex General Term, July 2, 1855. *C. L. Allen*, *Bockes* and *James* Justices.]

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9h 415
41h 593
24a 587

## Thomas *vs.* Clapp and others.

The renewal of a warrant issued for the collection of a school tax, is equivalent to issuing a new warrant. And if the renewal is signed by only two of the trustees of the school district, the third refusing to sign it, the latter is not liable for any act done under the warrant.

If a warrant is fair on its face, it affords a complete protection to the collector; and this even though he has knowledge of facts rendering the process void.

The warrant is sufficient if signed by two of the trustees.

A warrant is not rendered void by a direction to the collector to collect the amount of the tax, together with *five* per cent for his fees; although the act of 1849 gives the collector only *one* per cent on all sums paid in within two weeks.

The statute does not prescribe a new form for the warrant, but limits the action of the collector under it.

Where a tax is levied and assessed by all the trustees, and in performing that duty they act together and all concur, it is unimportant whether all are present, or not, when the warrant is signed; the signing of the warrant being but a ministerial duty.

The statute requiring the tax to be assessed and the tax list therefor to be made out by the trustees and a warrant attached thereto, within thirty days after the district meeting at which the tax was voted, is merely directory, as to time. It being for the benefit of the public, those acts may be done after the time specified in the statute has elapsed.

THIS action was brought against the trustees and collector of school district No. 3, in Hebron, Washington county, the plaintiff claiming to recover the value of a cow seized and sold by the collector under a warrant issued by two of the three trustees. The warrant purported to have been issued on the 16th of June, 1853, and was signed by Clapp and Hathway. It was renewed July 18, thereafter, and the renewal was signed by Clapp and Chapman. The list of inhabitants and apportionment of the tax to which the warrant was attached was signed by all three of the trustees. The tax was levied for the purpose of raising five hundred dollars to build a school house. The authority for levying the tax was a resolution adopted Jan. 4, 1853, at a district meeting, and was as follows: "Resolved, by the consent of the town superintendent, we raise the sum of five hundred dollars to build a new house in said district." No consent by the superintendent was proved, but no objection was made, on the trial, to the defect of proof, nor was it suggested

in the notice of appeal. The trustees acted together in making out the tax list, and in apportioning the tax; but there was no meeting by them either to sign the warrant or its renewal, nor was the warrant or renewal signed by two of the three when they were all present, or at a time and place of meeting of which all had notice. The cow was seized under the warrant as renewed, about the 8th of August, and was sold about the 15th. Judgment was rendered for the plaintiff, which on appeal was reversed by the county court. An appeal was then taken to this court.

*W. H. Brown*, for the appellant.

*L. Frazer*, for the respondents.

Bockes, J. The renewal was equivalent to a new warrant. (*Seaman* v. *Benson*, 4 *Barb.* 444. *Smith* v. *Randall*, 3 *Hill*, 498. *Folsom* v. *Streeter*, 24 *Wend.* 269. *Gale* v. *Mead*, 4 *Hill*, 109. *Parker* v. *Brown*, 17 *Barb.* 145.) The cow was therefore seized and sold under the command of Clapp and Chapman only. Hathway did not sign the renewal, but refused so to do. The county judge was therefore correct in deciding that the judgment was erroneous as to Hathway. The point is decided in *Van Rensselaer* v. *Kidd*, (2 *Selden*, 331,) where it is held that an officer issuing a warrant which is irregular and void, is not liable for the execution of it, after the return day.

If the warrant was fair on its face it afforded complete protection to the collector. (*Alexander et al.* v. *Hoyt*, 7 *Wend.* 89. *Savacool* v. *Boughton*, 5 *id.* 170. *Dunlap* v. *Hunting*, 2 *Denio*, 643, 645. *Bennett* v. *Burch*, 1 *id.* 141, 145, 146. *Cornell* v. *Barnes*, 7 *Hill*, 35.) And this rule obtains, even though he has knowledge of facts rendering the process void. (*The People* v. *Warren*, 5 *Hill*, 440. *Webber* v. *Gay*, 24 *Wend.* 485.) The warrant commands the collector to collect the several sums specified in the tax list annexed, from

the persons therein named, as thereby assessed, together with five per cent for fees. If there is any informality in the warrant it consists in the direction to collect five per cent for fees; the law of 1849 (*Sess. Laws of* 1849, *p.* 555) entitling the collector to but one per cent on all sums paid in within two weeks. This statute does not prescribe a new form for the warrant, but limits the action of the collector under it. He cannot demand or receive over one per cent for such sums as may be paid in to him within two successive weeks, and when he proceeds to collect after the expiration of that time he may collect, and should be commanded to collect, five per cent for his fees. He is to remain passive to receive during two weeks, and then is to proceed to collect, when he may demand five per cent on his collections for fees. (*Parker* v. *Brown*, 17 *Barb.* 145.) It was sufficient that the warrant was signed by two of the trustees. The statute requires that the warrant should be under the hands of the trustees, or a majority of them. (1 *R. S.* 903, 4*th ed. p.* 144. *Folsom et al.* v. *Streeter*, 24 *Wend.* 266.) The warrant was fair on its face, and hence afforded complete protection to the collector.

The tax was levied and assessed by all the trustees; and in performing those duties they acted together, and all concurred. This was an end of their judicial labors, and it was unimportant whether all were present or not when the warrant was signed. The signing of the warrant was but a ministerial duty. The case of *Lee* v. *Parry*, (4 *Denio*, 125,) and kindred cases, have therefore no application to this.

The statute requiring the tax to be assessed and the tax list therefor to be made out by the trustees and a proper warrant attached thereto, within thirty days after the district meeting in which the tax shall have been voted, is merely directory as to time. It being for the benefit of the public, those acts may be done after the time specified in the statute has elapsed. (*Gale* v. *Mead*, 2 *Denio*, 160, *and cases there cited.*)

It only remains to inquire whether the trustees had jurisdiction to levy the tax; and on this question there can be but

one opinion. They acted in pursuance of their duty, under a resolution adopted at a regular meeting of the inhabitants of the district.

The judgment of the county court should be affirmed.

[Fulton Special Term, May 15, 1855. *Bockes*, Justice. Affirmed at the Essex General Term, July 2, 1855, *C. L. Allen*, *Bockes* and *James*, Justices, for the reasons given in above opinion.]

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13a 378
13a 479

## The People, on the complaint of John Mathews *vs.* Thomas Toynbee.

## The Same, on the complaint of John E. Vassar, *vs.* Philip Berberrich.

So much of the 1st section of the act of the legislature entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, as declares that intoxicating liquors shall not be sold or kept for sale, or with intent to be sold, except by the persons and for the special uses mentioned in the act; so much of sections 6, 7, 10 and 12 as provide for its seizure, forfeiture and destruction; so much of the 16th section as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him which shall be purchased, taken, detained or injured, unless he prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him; so much of section 17 as declares that upon the trial of any complaint under the act, proof of delivery shall be proof of sale and proof of sale shall be sufficient to sustain an averment of unlawful sale; and so much of section 25 as declares that intoxicating liquor kept in violation of any of the provisions of the act, shall be deemed to be a public nuisance—are repugnant to the provisions of the constitution for the protection of liberty and property, and are absolutely void. Rockwell, J., dissented.

THE first of these cases came before the court on an appeal from a court of special sessions in the city of Brooklyn, and the other by certiorari to a court of special sessions of the county of Dutchess, in which courts the defendants were severally convicted of violations of the act of the legislature entitled

"An act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, and usually known as the "Prohibitory Liquor Law." (*Laws of* 1855, *p.* 340.)

*John A. Lott* and *A. Hadden*, for the appellants. I. The act under which the proceedings in this case were instituted, is unconstitutional and void. 1st. Because it is in violation of the first section of article 1, of the constitution of the state of New York, which provides that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. By "the law of the land," is meant a proceeding according to the course of the common law; a trial and judicial sentence, and not merely a statute passed for accomplishing the wrong. The property, the keeping of which is prohibited, is not only declared to be a public nuisance, by section 25, but the natural and unavoidable effect of the act is to render the property useless and unavailable to its owners as an article of traffic, and in the manner in which it has heretofore been used and disposed of; and the right to use his own property, to control and dispose of it, is a right and privilege secured to every citizen. Previous to the passage of the act under consideration, great numbers of the citizens of the state had, by manufacture and purchase, acquired and become the owners of, and therefore had vested rights in large quantities of liquors, wines and ales, the value of the principal part of which will be entirely destroyed if the act be sustained. The act is in violation of the same section of the constitution in this also: That by the 16th section of the act, every person who shall be engaged in the sale of the prohibited article, is deprived of his competency and right, when called upon, to act as a juror upon any trial under any provision of the act, without any legal or sufficient reason. (*Green* v. *Green et al.* 1 *Curtis*. 328.) 2d. Because section 5th, which directs the trial of the accused by courts of special sessions, is in violation of sec. 6, art. 1, of the constitution, which provides that no person shall be held to answer for an infamous crime (except in

the cases there specified) unless on presentment or indictment of a grand jury. 3d. Because it violates sec. 2 of art. 1, of the constitution, which secures the right of trial by jury, inasmuch as the 5th section of the act restricts the number of jurors to act on trials under the provisions of the act, to six only; whereas the right of trial by jury secured by the constitution is the right to be tried by twelve jurors. (*Taylor* v. *Porter*, 4 *Hill*, 140. *See also Debates in Convention of* 1846, *Argus edition*, *p.* 423, *&c.*) 4th. Because it violates sec. 5 of art. 1 of the constitution, by imposing excessive fines and inflicting unusual punishments. The 4th section of the act provides that every person who shall violate any provision of the preceding sections shall forfeit all the liquor kept by him in violation of either of those sections; which might well amount to many thousands of dollars in value. And the same section also directs the commitment of the defendant in case of default of payment of any fine, costs and fees, or any part thereof, until the same are paid, "*not less* than one day per dollar of the amount unpaid," thereby authorizing the imprisonment of the defendant for an unlimited time. 5th. Because it violates that part of the 6th section of the constitution which provides that no person shall be deprived of property without due process of law. The seizure directed by the 12th section of the act, is without due process of law. An enactment of a legislature is not a process of law. Those words mean a trial according to the known and established forms and rules for ascertaining guilt or determining the title to property. (*Opinion of Justice Bronson, in Taylor* v. *Porter*, 4 *Hill*, 145, 6. *Sackett* v. *Andross*, 5 *id.* 358, 9. *Westervelt* v. *Gregg*, 2 *Kernan*, 209, 212. 2 *Kent's Com.* 13. 2 *Inst.* 50.) The section referred to authorizes and directs the seizure of property to an unlimited amount by every sheriff, under sheriff, deputy sheriff, constable, marshal or policeman, however irresponsible, and without making any provision for securing the return thereof to the owner, in any case.

II. The act is an infringement of certain natural, fundamental and obvious rights and principles, which are not derived

from nor defined by any written constitution or laws, but which are recognized by and constitute the bases of both, thus The right of personal liberty, and the innocent use and enjoyment of the products of our labor and our property. The power of the legislature in the enactment of laws, (whatever it may be in other countries,) is not unlimited in this; but is restricted both by the written constitution, and by the generally received principles of justice and equal rights; and the judiciary is the only tribunal by which it can be peaceably determined whether the legislature have transcended their authority. (*Opinion of Justice Chase, in Calder* v. *Bull*, 3 *Dallas*, 386. *Opinion of Chief Justice Marshall, in Fletcher* v. *Peck*, 6 *Cranch*, 87. *Opinion of Bronson, J., in Taylor* v. *Porter*, 4 *Hill*, 146. *Opinion of Senator Tracy, in Bloodgood* v. *The Mohawk and Hudson R. R. Co.*, 18 *Wend.* 56, 61, 62, 63. *Opinion of Justice Hosmer, in Goshen* v. *Stonington*, 4 *Conn.* 225. *Wilkinson* v. *Leland*, 2 *Peters*, 654. *Smith's Com. on Statutory and Const. Constr.* 258 *to* 289. 2 *Kent's Com.* 329 *to* 340, *Lec.* 34, 2*d ed.*) Those provisions of the act which authorize the seizure and destruction of private property; which undertake to prohibit the use to which the proscribed property is generally and principally appropriated; which declare that to be a crime which is not considered by the world criminal, or even immoral; which assume the power to determine physical facts, as that all distilled and malt liquors are intoxicating, are unwarranted by any thing contained in the constitution, or in the delegated powers of the legislature. What is a nuisance, and what is intoxicating, are questions for adjudication, and not subjects of legislation; and the legislature have quite as much authority to declare the use of wine for sacramental purposes a nuisance, and pure water intoxicating, as to determine such to be the respective characteristics of liquor kept to be used as a beverage, and of distilled liquors. The prohibition by the act so far, at any rate, as regards domestic liquor, is in effect absolute, because no person under this act can have any authority to sell any quantity of it, except for purposes for which it is only accidentally useful, and in comparatively minute quantities,

and the sale of it even then, is authorized by a limited portion of the community only, under restrictions inconsistent with the proper disposition of property.

III. If the first section of the act is not unconstitutional, it does not apply to imported liquor. It is imported liquor which is authorized to be sold in this state by the laws and treaties of the United States, and it being in unequivocal terms provided by the concluding clause of the first section of the act, that that section shall not apply to liquor, the right to sell which, in this state, is given by any law or treaty of the United States, it is submitted, that the language is too plain, and the effect of it too obvious, to require the aid of any rules of construction. For authority that the importation of foreign liquor confers the right to sell, see *Brown* v. *State of Maryland*, (12 *Wheaton*, 419 *to* 442.) The reference to the laws and treaties of the United States is manifestly, not for the purpose of restricting the mode of selling, but simply for the purpose of designating the kind of liquor exempted from the application of the section.

IV. It should have been averred in the complaint and proved on the trial, that the liquor sold was not imported liquor, because, when the exception from the operation of a general provision is embodied in that provision, it must be averred in the pleading, that the act complained of is unauthorized by the exception. (2 *Saunders on Pleading*, 257. *Vavasour* v. *Ormond*, 6 *Barn. & Cres.* 431. 1 *Chitty's Crim. Law*, 283, 284, 285. *Teel* v. *Fonda*, 4 *John.* 304.) The exception is included in the general expression "except as hereinafter provided," in the first line of the section, although more particularly described in the last clause of it.

V. The champagne wine sold by the appellant, was not sold in violation of the act, under any construction of it, because, 1st. It was at folio 16 of the case proved to be "imported liquor;" and secondly, because there is no regulation or restriction as to the quantity or form in which wine may be imported.

VI. The judgment of the court of special sessions is erroneous, because it does not specify whether the appellant was convicted of selling the brandy or champagne; or which of them

he was convicted of having in his possession with intent to sell; nor for what he was adjudged guilty of a misdemeanor; nor for what he was sentenced to pay the penalty of fifty dollars; and also because it adjudged too that the champagne wine which was proved to be imported liquor, be forfeited and destroyed.

VII. The judgment of the court of special sessions was contrary to law and the evidence, and should be reversed.

*J. M. Van Cott*, and *N. F. Waring*, for the plaintiffs. The attention of the court is asked to two questions, 1st. To the extent of the prohibitions contained in the act of 1855, to prevent pauperism and crime; and 2d. To the validity of such prohibition.

I. The prosecutor claims, that the exception in section 1, extends only to imported liquor while in the original package of importation. The exception does not, in terms, name foreign or imported liquor at all; and the court is compelled to look beyond the act and into the treaties and statutes of the United States, to learn what is excepted. If those treaties and statutes said, *in terms*, (what the supreme court in *Brown* v. *Maryland*, 12 *Wheat.* 419, decided they say by implication) that imported liquors may be sold while in the original packages, those terms would have to be imported into our statute, *and being there*, would clearly define the scope and limit of the exception. No rule of interpreting penal statutes requires the court to disregard this decisive method of expounding this exception.

If any doubt were left by this view, it would be dissipated by § 22. The *sole office* of that section will be found to be, to *define and limit*, the undefined and unlimited expressions of section 1. It contracts the large expressions, "*intoxicating liquor*," in section 1, by excluding from their operation much that those large terms would include.

And it defines the *exception* in section 1, to mean imported liquor "in the original packages." It does not weaken this to say, that this definition in section 22, misapprehends the decision in *Brown* v. *Maryland*; for we are inquiring what the

legislature *intended*. We say, they *intended* to limit the exception to the "original packages," and that that *intention* is not disproved by saying they also intended to limit it to such original packages, *while in the hands of the original importer*. The paramount rule of construction is, that the *intention* of the legislature is to take effect. All other rules are subsidiary to this.

For two striking illustrations, in the case of penal statutes, see *People* v. *Bedell*, (2 *Hill*, 196 ;) also under the general bankrupt act, Mr. Lord's opinion concedes, that the *intent* of the legislature, so to limit the exceptions, is pretty decisively indicated. And we say, that such intent speaks through all the terms and the entire frame of the act.

II. The prohibitory part of the act is within the constitutional competency of the legislature. 1. The prohibition is not total. (1.) It permits the liquor to be *kept* and *used* by its owner for any and every purpose. (2.) It permits the owner to export the whole of it. (3.) It permits an unlimited sale by the owner (from 9th April to 4th July,) for a period of three months, *within the state*, subject to existing laws. In this respect, the act is analogous to the statutes abolishing slavery after a prospective date. And like the recording acts. See *Varick* v. *Briggs*, (6 *Paige*, 323, *unanimously affirmed by court of errors*, 22 *Wend.* 543.) where it was held, that an owner who did not record his deed within the limited period, *forfeited his estate* to a subsequent bona fide purchaser, who first recorded his deed. (4.) It permits the sale of imported liquor under treaties and acts of congress. (5.) It permits the sale (under license, and the validity of a *license* system is not denied) of all liquor, within the state, for mechanical, manufacturing and medicinal purposes. (6.) And finally, it only prohibits a sale for particular purposes, and the keeping it for such *unlawful sale*. The question as to the power to pass prohibiting laws as presented by this act is thus greatly narrowed.

But the act may be said *to involve the whole principle of prohibitory laws*, and I shall so discuss it. (1.) On grounds of abstract reason, relating to the nature of civil society, and to the

particular organic societies framed on the English model; and (2.) On the terms of the state constitution, and the principles of adjudged cases.

III. The act in question is in the nature of a police regulation, and falls within the necessary powers of civil government. The fundamental idea of a police regulation is, that it forbids acts deemed injurious to the society, and which the collective will and force of the society are alone competent to prevent. Society is founded on the paramount law of self defense. Its organism should therefore arm it against all internal and external foes. To that end, there must reside somewhere in it the power to determine *what is* hostile to its existence and *what means* shall be used to repel the danger. In a pure democracy that power would reside in the *collective people*. In a representative government, it will be lodged in some great department. In modern political societies, and especially in those formed on the English model, that sovereign power is lodged in the legislative department. It is, confessedly, lodged *in no other* department in our American system. Wherever lodged, it must be as ample as when originally exerted by the *collective people* in a democracy. In the nature of things it is a comprehensive and undefined power. The exigencies of society, as to persons and things, and as to time, place and circumstances, are *infinite*, and so must be the power that provides for those exigencies. "The contingencies of society are not reducible to calculations; they cannot be fixed or bounded, even in imagination. Will you limit the means of your defense, when you cannot ascertain the force or extent of the invasion?" (*Hamilton, Works, vol.* 2, *p.* 457.) "When you have divided and nicely balanced the departments of government; when you have strongly connected the virtue of your rulers with their interest; when, in short, you have rendered your system as perfect as human forms can be, you *must* place confidence, you *must* give power." (*Id.* 454.) And see the arguments of Mr. Hamilton and Mr. Madison, in the Federalist and in the letters of Pacificus and Helvedius, where the nature of legislative and judicial powers is discussed, and this principle established by irresistible argu-

ments. To limit this general power to defend the society against internal and external dangers, would leave it vulnerable at that point, and invite attack where it was thus less undefended; as Achilles was mortally wounded in the heel. It would be found on investigaiton, that no American constitution contains such a limitation among its restrictive articles. Not one limits the power to determine what physical acts or facts are dangerous to society, and what means shall be used to repel the danger. And it results from the constitution of society and the nature of government, that what powers of defense are not integrated in the organism itself, do not exist any where. If it is said the legislature cannot by statute prohibit a certain traffic, because the prohibition violates the first principles of society, we answer it would result that neither could the people, by their constitution, prohibit it; and if the statute is to be overthrown by the judiciary on any such abstract notion, it would be equally at liberty and bound to overthrow a like express constitutional prohibition; the limitation, *quoad hoc*, being equally upon the people and the people's representatives, to the legitimate ends of society and government. The denial that the people have delegated the power to the legislature, to enact the law in question, on the ground on which it is placed, is the denial of the power of the people to delegate such an authority. But if the power of the collective people to enact such laws, is conceded or proved, we proceed to maintain,

IV. Under the state constitution, the legislature is invested with power to pass prohibitory laws, like that in question. (*Constitution* 1777, § 2.) "The supreme legislative power within this state shall be vested in two separate and distinct bodies of men." (*Const. of* 1822, § 3, *art.* 1, § 1.) "The legislative power of this state shall be vested in a senate and assembly." (*Const. of* 1846, *art.* 3, § 1.) "The legislative power in this state shall be vested in a senate and assembly." What do the terms "*the* legislative power," and "the *supreme* legislative power," import? The two expressions are undoubtedly equivalent. The grant is of "*the*" legislative power—the *whole* power—the power as large in *its substance* as it can be

*conceived in idea.* The distinction between the federal and state governments is familiar. The federal government takes *no power*, not expresssly or by necessary implication granted; the state government takes *all power*, not expressly or by necessary implication withheld. The *terms* in which the legislative power is granted are intentionally unlimited and unqualified. The framers intended to grant *all*, so far as the articles cited are employed, and to provide elsewhere, by express restrictions, for the only limitations by which the legislative department should be circumscribed. The state government having been instituted by *English colonists*, and avowedly on *the English model*, we are to ascertain the import of the terms they have used by learning the sense in which they were understood in the English law, and by those colonists and the cotemporary writers. That is the approved mode of defining constitutional language. *Dash* v. *Van Kleeck*, *per Spencer*, *J.* (7 *John.* 488. 9.) *Calder and wife* v. *Bull and wife*, (3 *Dallas*, 396.) In these cases, the court take Blackstone's definition of *ex post facto* laws, as an authoritative exposition of those terms in the constitution. (4 *Coke's Inst.* 36.) "The power and jurisdiction of parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. Lord Camden, (*Sutick* v. *Carrington*, 19 *How. St. Tr.* 1066,) having spoken of property as sacred, he adds, but "it may be taken away by laws of forfeiture and for the public good," "every man, by common consent, gives up that right for the sake of justice and the general good." (1 *Kent's Com.* 320.) "The power of making laws is the supreme power in a state." (1 *Black. Com.* 160, *et seq.*) "It (parliament) hath *sovereign* and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal, this being the place where *that absolute despotic power*, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All *mischiefs* and grievances, operations, and remedies, that transcend the

ordinary course of the laws, are within reach of this extraordinary tribunal." (2 *Story's Com. on Const. p.* 15, § 532.) "The truth is, that the legislative power is *the great and overruling power in every great and free government.*" (*Id.* § 533.) "There are many reasons which may be assigned for the engrossing influence of the legislative department. In the first place, its constitutional powers are more extensive and less capable of being brought within precise limits, than those of either of the other departments." After speaking of the limits on the executive and judicial, he adds: "*On the other hand, the legislative power, except in the few cases on constitutional prohibition*, is *unlimited.* It is forever varying its means and its ends. It governs the institutions, and laws, and public policy of the country. It regulates all its vast interests." Does not this language describe a transcendent power? Equally decisive is the language of Iredell, J. and Spencer, J. in the cases cited, *supra*, from *Dallas'* and *Johnson's Reports. Broom's Legal Maxims*, 6. "From the principles under consideration, and from the very nature of the social compact on which all municipal law is founded, and in consequence of which every man when he enters into society gives up a part of his natural liberty, result those laws which, in certain cases, authorize the infliction of penalties, the privation of liberty and even the destruction of life, with a view to the future prevention of crime and to insuring the safety and well being of the public." (*Rutherforth's Inst. b.* 2, *ch.* 3, §§ 1 *to* 5.) In section 3, he says: "Those who are united in a civil society, have agreed to put themselves under the conduct of the common understanding, to have their duties regulated, and their rights adjusted by the legislative power of that society." (*Rousseau's Social Compact, ch* 4.) "If the state, or the city, be a mere moral person, whose life depends on the union of its members, and *if the most important of its concerns be that of its own preservation, it should certainly be possessed* of an universal *compulsive force*, to move and dispose each part in such a manner as is most conducive to the good of all. * * * The social compact gives to the body politic an absolute power over all its mem-

bers. * * * It is agreed, that what an individual alienates of his power, his possession, or his liberty, by the social compact, is only such parts of them whose use is of importance to the community; *but it must be confessed*, also, that the *sovereign* is *the only proper judge of this importance.*" *Locke and Paley* on government are to the same effect. *De Lolme, S. P. ch.* 3, 7, 8. *Sydney on Government, ch.* 3, §§ 44, 45, 46. He maintains the same principle, as inhering in the very nature and necessities of society. In section 45, he says, "If it be objected that I am a defender of arbitrary powers, I confess I cannot comprehend how any society can be established or subsist without them. * * * The judgments of men will vary if they are left to their liberty, and the variety that is found among them, shews they are subject to no rule but that of their own reason, by which they see what is fit to be embraced or avoided, according to the several circumstances under which they live. *The authority that judges of these circumstances is arbitrary*, and the legislators shew themselves to be more or less wise and good, as they do, rightly, or not rightly, exercise this power. The difference, therefore, between good and ill governments *is not, that those of one sort have an arbitrary power which the others have not; for they all have it;* but that those which are well constituted, place this power so as it may be beneficial to the people." (*Guizot's History of Representative Government, p.* 442.) "But we must necessarily come at last to the supreme power which superintends all others, and is not itself ruled or restrained by any visible and constituted power." For further illustration of the principle contended for, and of *sovereign power* generally, see 1 *Bl. Com.* 48, 9, 51, 2, 147; *Vattel, b.* 1, *ch.* 1, §§ 1, 2; *ch.* 3, §§ 26, 38; *ch.* 20, §§ 240, 244; *Grotius on War and Peace, b.* 2, *ch.* 14, § 7; *Id. b.* 3, *ch.* 22, § 7; *Puffendorf's L. Nat. and Nat. b.* 8, *ch.* 5, §§ 1, 3, 6, 7; *Thomas' Univers Jurisp. pp.* 170, 1, 165, 6.

That it is competent for the legislature, "acting on a broad and general regard to the interests of the community, to declare and limit the uses to which property may be applied," see *Stuyvesant* v. *Mayor of New York*, (7 *Cow.* 588;) *Vanderbilt*

v. *Adams*, (*Id.* 349;) *Commonwealth* v. *Dana*, (2 *Metc.* 229;) *Baker* v. *Boston*, (12 *Pick.* 184;) *Commonwealth* v. *Tewksbury*, (11 *Metc.* 58, 9;) *Same* v. *Alger*, (7 *Cush.* 86;) *Preston* v. *Drew*, (33 *Maine R.* 560.)

For special instances of the exertion of powers of police and regulation, see R. S. ch. 20, tit. 9, "Of the regulation of taverns and groceries." Tit. 19, Brokerage and stockjobbing. Statutes laying out streets, and restricting prospective use of property, see cited *Matter of Furman street*, (17 *Wend.* 649.) As to pulling down buildings, without compensation, in case of *fire*, see 2 *R. L.* 1813, *p.* 368, § 81; *p.* 369, § 83; *Mayor* v. *Lord*, (17 *Wend.* 285, 295;) *S. C. in error*, (18 *id.* 126, 130;) *Stone* v. *Mayor &c. of N. Y.* (25 *id.* 157;) *Russell* v. *Same*, (2 *Denio*, 461;) *Commonwealth* v. *Sessions of Norfolk*, (5 *Mass.* 437;) *Same* v. *Sessions of Middlesex*, (9 *id.* 388.)

This legislation, and these cases, can only be sustained on the ground that property under certain circumstances, judged of by the legislature or of which others are empowered to judge, is *dangerous* and may be *destroyed*. The established legislation, and the cases decided on these statutes, do not sanction a distinction between *malum prohibitum* and *malum in se*. Both classes of laws have the same sanction, *the public will*, ascertained and declared by the organic governments; and one class of laws rests on as solid a foundation as the other.

The power to prohibit, then, results, 1. From the nature of government, and the illimitable nature of the power to make laws required for the ends of society. 2. From the power of the society—being coextensive with the original power of the collective people. 3. From the express grant of the constitution. The inference of the power is strengthened. 4. By the *fact* that there are express restrictions upon the legislative power, (*expressio unius, &c.*) 5. By the *nature* of the restrictive articles, being upon *fundamental points*, and the only points that were deemed necessary to be reserved, or where reservation was practical or safe. The function of written constitutions is not so much to *create* as to limit the powers of government; and where power is not expressly limited, a limitation is not to be

inferred. 6. Because, having the general discretionary power to pass police laws, discretion is in its nature *exclusive* and not *subject to control.* (1.) *Executive discretion. Martin* v. *Mott,* (12 *Wheaton,* 28.) Executive sole discretion under act of congress, to determine when a case of danger of invasion arose, and to call out militia. (2.) *Judicial discretion.* It is a settled principle of the courts, that error does not lie upon a judgment in a matter of discretion. (3) *Legislative discretion.* (*Beekman* v. *Saratoga and Schen. R. R. Co.,* 3 *Paige,* 45.) Held that it was exclusively for the legislature to judge when public necessity required the taking of private property for the *quasi* public use of a rail road company. (4.) The principle seems to be a universal one in our jurisprudence. (*Lawrence* v. *Minturn,* 17 *How. U. S. R.* 110.) The master of a ship made a jettison of a very valuable part of a cargo stowed on deck. This was done *in a calm,* under the apprehension that if a storm arose the ship was not strong enough to endure the strain of the cargo. The court would not entertain the question whether the jettison was *actually necessary.* 6. The court, by Curtis, J. "*It will be deemed* to have been necessary for the common safety, *because the person to whom the law has intrusted authority to decide upon and make it, has duly exercised that authority.*" 7. The illimitable character of the legislature is also inferrible from the nature and scope of the other departments. (1.) The *executive* finds the law made, and can neither add to nor take from it, but simply executes it. (2.) The *judicial* also finds the law made, and can neither alter, increase, nor diminish it. It interprets the *constitution.* It interprets the *statutes.* It ascertains and declares the customary or common law. These are its atmosphere, and it breathes nowhere else. It knows neither rights nor wrongs, beyond these divisions of law. It has no general supervisory power over policy or laws. It decides between the parties and upon the case before it. How different is all this from the legislative! At a single stroke, it may destroy the whole body of the statute and common law. By its single *fiat,* it may recreate an entirely new body of laws, a civil and a criminal code. It may change the *substantive na-*

*ture*, and all the *legal definitions*, of crimes. Is not the department, that is confessedly competent to these tremendous exertions of power, competent to judge and to exact a particular employment or trade to be inimical to the public welfare, and so to prohibit it? Who shall judge what is inimical to society, and so prohibit it? In the nature of things, the power must be a *unit:* it cannot be in several departments of the government. Nor can it be contingent, to be exercised in the first instance by one, the judgment and the statute to derive their authority from the subsequent concurrence of another department. It cannot be a compact between several departments. What is spoken must be by one, and with the potential authority of law, from the beginning. Nor is it an objection, that the legislature may err. May not the executive or judicial department err? A great temporary evil may result from legislative error, but that may always result from a mistake in the policy of laws. Nor could the power be more safely lodged. It is exerted by the immediate representatives of the people, elected for a short term.

The objection to the power of prohibition rests upon the narrowest and frailest basis. It is said, that if four judges of the supreme court, or eight judges of the court of appeals, should concur with the legislature that prohibition is required by sound policy, the act will be adjudged valid. But what if they whose opinion has no authority as to the policy of laws, should *not* concur, how is that to make the law void? Is the constitutionality of laws to be tested by the certainties of fixed principles and a written constitution, or by loose and uncertain opinions (which are forever fluctuating) as to the policy, the wisdom or the necessity of laws? It is for those who assert the power of the judiciary to pass upon the necessity of a police regulation, to define the principle upon which the power is to be exerted and the limit to be set to its exercise. May the power be exerted upon all statutes that rest upon opinion? What statute may not be torn from the book? Or is the judicial power limited to a clear case of excessive legislation? What is a *clear* case? By what rule is it to be tested? Or is it said, that the power is only to be exerted against *unnecessary* laws? But

who is to judge of their necessity? Or if the *degree* of the *evil* aimed at, or the *degree* of the necessity for the prohibition, or the degree of the penal infliction is to determine the fate of the law, what delicate and accurate instrument is to be used to determine the degree? In what degree are *gambling houses* and *houses of prostitution* evils? In what degree is *usury* injurious? In what degree are *lotteries* an evil? In what degree is the use of *opium* injurious, so as to make a prohibition of an open and tempting traffic in it improper? It is exclusively for the legislature to answer these, and all similar questions.

Now, to apply the argument. The respondent claims that the act in question is valid, upon the principles above stated. That alcohol may be so used as to destroy body and mind will not be denied. Nor will it be denied that it often is so used. Nor will it be denied that facilities for procuring it, and the temptations to its use by an open and free traffic, greatly tend to such excessive use. Nor will it be denied, that the habits thereby formed, while destructive to the individual, are greatly injurious to society, destroying industry and thrift, preventing accumulation and use, and impairing material interests. Nor will it be denied that these very common results of an excessive use, engendered by the temptations and facilities of an open traffic, produce more poverty to be supported in poor-houses, and more crime to be repelled by police establishments and restrained by prisons, than all other personal vices together. In the main, the other social vices being the progeny of this gigantic and prolific vice. However these facts may be presented, (in a cold and colorless medium, or in a highly colored rhetorical statement,) their general truth will not be disputed by candid men.

Now, the legislature, reasoning upon these facts, say, if we have the power to burden those who do not profit by the traffic in liquor, by heavy taxes to support the pauperism and guard the crime the traffic produces, we also have the power to relieve from those oppressive and unjust burdens by enacting laws which will remove the cause of them. It is respectfully submitted, that laws against luxuries, laws against employments and acts that tend to vicious habits, and to make the citizen, and the

state, poorer and weaker, are based on considerations of *policy* that belong to political economists and statesmen, and not on questions of constitutional power that belong to judges and courts of justice.

As to this particular law, it is conceived that its whole prohibitory principle was involved in the "No license" act of 1846. (*see* 5 *Denio*, 70,) and in the fifteen gallon laws of Massachusetts and Rhode Island that were before the supreme court in the *license cases* in 5 *Howard*. Under both laws, it often happened that no license would be granted; and practically, an inability to buy or sell less than the minimum quantity that could be lawfully sold was an inability to buy or sell at all; as much so as now, where the limit is to the fifteen gallon package of original importation. In the license cases, the right of total prohibition was expressly declared by the judges.

Taney, Ch. J., (5 *Howard*, 577.) "And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, *I see nothing in the constitution* of the United States to prevent it from regulating and *restraining* the traffic, or from *prohibiting* it altogether, if it thinks proper. Of the wisdom of this policy, it is *not my province* or my purpose to speak. Upon that subject each state must decide for itself. I speak only of the restrictions which the constitution and laws of the United States have imposed upon the states."

McLean, J., (page 591.) "This [the limit as to quantity that may be sold] is altogether arbitrary, and must depend upon the discretion of the law-making power, the same discretion that imposes a tax, defines offenses and prescribes their punishment, and which controls the internal policy of the state. * * * In all matters of government, and especially of police, a wide discretion is necessary. *It is not susceptible* of an exact limitation, but must be exercised under the changing exigencies of society."

Grier, J., (631, 2.) "It is not necessary for the sake of justifying the state legislation now under consideration to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The *police*

*power*, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of *restraint* or *prohibition* necessary to effect the purpose are within the scope of that authority." It may be said that these expressions were *obiter*. Whether they were so or not depends on this. If it is claimed that such laws are contrary to the first principles of political society, (i. e. of republican institutions,) the court had cognizance of the very question, under article four, section four of the federal constitution; and in that view, these license cases are expressly upon the point, and a decisive authority in favor of the validity of the statute. If, on the contrary, it is not claimed that the act violates the principle of republican institutions, the whole ground on which a vast superstructure of argument was attempted to be raised is surrendered. Indeed the power of the legislature to prohibit has hardly been seriously questioned in any case. And even where counsel have made the point, it has hardly had the respect of a passing notice in the judgment pronounced by the court. (*See* 1 *Gray's Mass. Rep.* 1.)

The case of *Austin* v. *State*, (10 *Miss. R.* 194,) is deemed a direct decision in favor of the power. For the extent of the power to make police regulations, see the above cases, and also *Miln* v. *New York*, (11 *Peters*, 139.)

Brown, J. Philip Berberrich, the defendant in one of these actions, was arrested under the act of the 9th of April, 1855, entitled "An act for the prevention of intemperance, pauperism and crime," charged with having in his possession, with intent to sell and with having sold, intoxicating liquor called lager bier. He was brought before E. Q. Eldridge, Esq., county judge of Dutchess county, and upon a trial by a jury, was found guilty. At this stage, and before sentence, the proceedings were removed into this court by *certiorari*.

Thomas Toynbee, the defendant in the other action, was also arrested under the same act, without warrant, by John Mathews, a police officer, and brought before D. K. Smith, a police justice of the city of Brooklyn, and there charged with being in the

act of selling intoxicating liquor, to wit: one glass of brandy; and also, with having in his possession other intoxicating liquor, to wit: champaigne wine, with intent to sell the same. The wine was seized by the officer. At the trial before the justice, without a jury, sitting as a court of special sessions, Toynbee was found guilty, and sentenced to pay a fine of $50, with $5.87 costs, and to be committed until such fine and costs be paid, for a period not exceeding 56 days. It was also adjudged that the liquor seized be forfeited, and a warrant issued for its destruction. The defendant appealed to the general term of this court, and thus we have the principal questions which arise upon the construction of the act, its force and obligation as a law, presented for the consideration and judgment of this court.

The object to be effected by the statute under which these proceedings are had, must be ascertained from an examination of its various sections, 26 in number. If its office is one of mere regulation—to prescribe by whom and to whom and at what places liquors in certain quantities may be sold—then it does no more than the excise law, which it is thought to supersede; and although prejudicial to existing interests, and may subject certain classes to some privations and inconveniences, it is nevertheless a law of binding obligation, which the people must obey, and the tribunals of justice enforce. If, however, its office and purpose is greater and more comprehensive than mere regulation, if it aims at prohibition—prohibition of sales as well as of general and ordinary uses, to an extent which deprives the subject of the law of its value, and strikes down the vast and varied interests concerned in its importation, sale and production; if it provides for the seizure, forfeiture and destruction of an article or thing, the product of human industry, hitherto invested with the attributes of property, solely because its producers or owners design to make it the subject of sale and transfer, to deal in it and with it as property, and apply it to general uses, then the question assumes a very different character, and we are brought to inquire whether an act pregnant with such consequences, and armed with such unusual and dangerous powers, is really within the sphere of legislative authority. It is just to observe, that

while sales by persons generally and for general uses are expressly forbidden, there is no positive interdict against its general use when lawfully acquired. Yet, as there can be no lawful sales after the act takes effect, except by the authorized venders for certain special purposes—and as the act is careful to impose one of its penalties upon purchasers from authorized venders, under a false representation that it is designed for an authorized use—it seems clear that the intent was to interdict the general use.

Section 1 forbids the sale, and the keeping for sale, or with the intent to sell, except in the cases enumerated in the subsequent sections, and also in the case mentioned in the last clause of the same section, which clause is supposed to be of doubtful import. The sales excepted from the prohibition of the first section, other than those in the latter clause, are sales to authorized venders, and sales by them for mechanical, chemical and medicinal purposes, and of wine for sacramental uses: also, sales of cider in quantities not less than ten gallons; sales of alcohol by manufacturers; of wine from grapes grown by the seller, and of foreign liquor in the original packages to authorized venders. Section 4 declares offenses against the act misdemeanors, and provides for their punishment by fines and imprisonment. Section 5 designates the officers who shall have cognizance of such offenses, and prescribes the form of the proceedings and of the trial. Sections 6 and 7 contain what are called the search and seizure clause; and section 10 provides for the condemnation and destruction of the liquor. Section 12 authorizes sheriffs, marshals, constables and policemen to serve the process, arrest persons in the act of selling, and to seize without warrant liquor kept against the provisions of the act. The owner may interpose a claim to the liquor seized pursuant to the provisions of section 7, but he must first purge himself under oath of any design to disobey or evade the law, before he can be noticed or heard. Section 16 deprives the owner of his right of action to recover the value of any liquor sold to a purchaser, or taken, detained or destroyed by a wrongdoer, unless he shall prove that such liquor was sold according

to the provisions of the act, or was lawfully kept and owned by him. And section 17 declares, that upon the trial of any action to enforce the penalties and forfeitures, proof of a delivery shall be deemed evidence of sale, and proof of sale shall be sufficient to sustain the averment of unlawful sale. Section 25 declares all liquors kept in violation of any of the provisions of the act a public nuisance. The abatement of public nuisances is one of the remedies by the act of the party which the law concedes to any person injured, and he may proceed to the removal and destruction of the nuisance without the process or judgment of any court. (3 *Black. Com.* 5.) So that if this clause is to have any effect, it can be none other than to invite and justify depredations upon the proscribed article. These provisions are vindictive. They are novel and unusual. If we except some few states of the confederacy, who have recently entered upon a similar course of legislation, they have never before found a place in the written code of a civilized country. They are designed to work a forfeiture of goods—a deprivation of liberty and property—by means unknown to the common law. They set aside the just and humane rules of evidence, approved by time and sanctioned by sound philosophy. They assume a delivery to be a sale, and proof of a sale sufficient to sustain an averment of unlawful sale. And they refuse to notice or hear a citizen in defense of his own property, unless he first submit to take the oath demanded by the act, and disclose the facts upon which he relies to establish his innocence. It awakens strange emotions in this age of progress and improvement, to behold enactments like these embodied amongst the written laws of a people distinguished for their moderation, their moral excellence, their love of justice, and their ready perception of the distinction between right and wrong; a people of Anglo-Saxon lineage, versed in the jurisprudence of Coke and Blackstone, and Kent and Story, and who are proud to trace the fundamental principles of their goverment upward, through the revolutionary struggles of 1776 and 1688, the conflicts and trials of the great rebellion, back to the conferences of the barons at Runnymede. Impressed by the novel and extraordinary

features of the act, and the doubts suggested by its perusal, I turn to the organic law as the true test of legislative power, and regardless for the time of the subordinate questions involved in the controversy, proceed to inquire whether its provisions do not fall within the prohibitions of the constitution. I shall assume for all the purposes of this argument, that the prohibitions of the act extend as well to liquors which are the growth and manufacture of foreign countries, as to those which are of domestic origin. Indeed, if we look at its title, to which resort may be had to remove ambiguities when the intention of the lawgiver is not plain, and read the closing sentence of section 1, which is thought to exclude foreign liquors, in connection with that part of section 22 which declares that it shall not be construed "to prevent the importer of foreign liquor from keeping or selling the same to any person authorized by the act to sell such liquors," the intention of the legislature to include both kinds, can hardly admit of a doubt. The exception upon which the uncertainty arises proceeded, doubtless, from a desire that the law should conform to the decision in *Brown* v. *The State of Maryland*, referred to hereafter. And the obscurity and want of precision in the language employed must, upon the usual rules of construction, yield to the intention, when that can be ascertained from an examination of the law itself.

In neither of the cases under consideration, were the defendants impleaded or brought to trial upon the indictment of a grand jury. Indeed, the law contemplates no preliminary inquiry by the grand inquest. The counsel for the defendants insist that in this respect it is in conflict with that part of sec. 6 of art. 1 of the constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, (except, &c.) unless on presentment or indictment of a grand jury." This involves an inquiry into the character of the crime created by the act. Is it an infamous crime? Offenses which rendered the perpetrator infamous at the common law, were treason, felony, and the *crimen falsi*. It is not easy to define the meaning and extent of the latter term, with certainty,

It not only involved falsehood, but offenses which injuriously affected the administration of justice. It was the infamy of the crime and not the nature of the punishment, which constituted the *crimen falsi*. Thus a conviction for libel, or for seditious words, or for keeping a gaming-house, did not render a man infamous. (*Wharton's Crim. Law*, 354. 1 *Rus. on Crimes*, 45. 1 *Phil. Ev.* 28. *Barker* v. *The People*, 20 *John.* 457. *Peake's Ev.* 126.) The present constitution was adopted in 1846. At that time the term infamous crime was and still is defined, in the 2d vol. revised statutes, 587, § 31, to include every offense punishable with death or by imprisonment in the state prison, and no other. Such is also the statutory definition of felony. The framers of the constitution must have understood and intended that others should understand the term in the legal sense then given to it. And it does not embrace the offense created by the act under consideration. It is not, therefore, a valid objection, that the defendants were impleaded and put upon their trial without the indictment of the grand jury.

We have already seen that the object of the law is prohibition. For general and ordinary uses—for all but a few special purposes—liquors having intoxicating properties are to be banished from society, and neither bought nor sold. The trades and employments connected with their importation, manufacture and distribution, are to be suspended or put down, and the interests which supply such trades and employments with capital, raw material, labor and means of transport, are to find other fields of enterprise, or be put down with them. This brings me to consider the principal question discussed upon the argument, which is this: Does the legitimate authority of the legislature extend to the enactment of laws prohibitory of the common and ordinary use of property? Can this department of the government, in the execution of the trusts confided to it, declare by statute an article or thing, the product of human industry or the creation of human skill, long recognized as property, and of all but universal use, and perfectly inoffensive in itself, to be a public nuisance, and thus authorize and jus-

tify its destruction? It is worth while, before we proceed further, to inquire what the proscribed article or thing is—to consider its qualities and uses, and whether it is invested with the attributes of property, so as to entitle it to the protection of the constitution.

The taste for intoxicating drinks is thought to be an instinct of our nature—an operation of the principle of organized life, and not an artificial appetite or desire peculiar to races or tribes, and induced by habit, or climate, or other external influences. History and tradition corroborate the results of chemical and physiological investigation. With the earliest Hebrews, the most ancient Egyptians—with the refined and intellectual Greeks, and the robust and resolute Romans—wine was the favorite beverage, if not a part of the customary food. Among the nations whose empires were upon the shores of the Mediterranean and its adjacent seas, long before the Christian era, the fruit of the vine and the olive, together with the cereal grains, were the staple products of agriculture and the principal articles of trade and commerce. "Savage and civilized tribes, near and remote—the houseless barbarian wanderer, the settled peasant and the skilled citizen—all have found, without intercommunion, through some common and instinctive process, the art of preparing fermented drinks, and of procuring for themselves the enjoyments and miseries of intoxication. The juice of the cocoa-nut tree yields its toddy wherever this valuable plant can be made to grow. Another palm affords a fermented wine on the Andean slopes of Chili; the sugar palm intoxicates in the Indian Archipelago and among the Moluccas and Philippines; while the best palm wine of all is prepared from the sap of the oil-palms of the African coast. In Mexico the American aloe gave its much loved *pulque*, and probably, also, its ardent brandy, long before Cortez invaded the ancient monarchy of the Aztecs. Fruits supply the cider, the perry and the wine of many civilized regions; barley and the cereal grains, the beer and brandy of others; while the milk of their breeding mares supplies at will to the wandering Tartar, either a mild, exhilarating drink, or an ardently intoxicating spirit.

And to our wonder at the wide prevalence of this taste, and our surprise at the success with which in so many different ways mankind has been able to gratify it, the chemist adds a new wonder and surprise, when he tells us that, as in the case of his food, so in preparing his intoxicating drinks, man has every where come to the same result. His fermented liquors, wherever and from whatever substances prepared, all contain the same exciting alcohol, producing every where, upon every human being, the same exhilarating effects." The wines of France, Italy and Spain, the beer of the German states and the ale and porter of the British Islands, enter largely into the domestic consumption of the inhabitants of those countries, as a part of their daily food. With our own citizens the use of fermented liquors, in some form or other, is all but universal. Either as a beverage or in the preparation of their food, few families are entirely without it. Should these facts suggest the probable result of a movement to quench an appetite so prevalent and so deeply seated, by interdicting the use of the means which a wise and beneficent Providence has every where furnished for its gratification, they also show that whenever and wherever man rises above the savage condition, and begins to exhibit the rudiments of civilization, intoxicating drinks, and the fruits and plants and grains from which they are expressed or extracted, are among the first things which he separates from the common stores of nature, appropriates to individual use, and impresses with character and attributes of property. Chemical and physiological science must determine whether alcohol, the essential element of intoxicating liquors, is food for the invigoration, or poison for the destruction, of the human system. The law is only concerned to know whether they fall within the catalogue of things which it recognizes as property. I find no definition of property that does not apply to intoxicating liquor. It has been separated from the common stock of nature for private use. It is that over which man may exercise absolute dominion, to the exclusion of every other person. By many it is regarded as an article of diet; by all, as one of trade. It is bought and sold, lost and acquired, like other property. The law in

question treats it as property—authorizes its sale under certain limitations and for certain prescribed uses. And when it speaks of its forfeiture, it means a forfeiture of the right of property. In every sense of the term it is property, endowed with the same rights and subject to the same measure of control as other property, and no more.

The learned counsel for the people, in the case against Toynbee, insists that the legislative department of the state, being founded upon the model of the English parliament, has power to declare and limit the uses to which property may be applied, and when it shall cease to be property. This power, he argues, results, 1. From the express grant of the constitution; 2. From the general illimitable nature of legislative power required for the ends of society; 3. From being co-extensive with the law-making power in a democracy; and, 4. From the fact that discretion, legislative and judicial, is in its nature exclusive and subject to no control. This, doubtless, is a true exposition of the power of the parliament of Great Britain, which is said to be "so trancendent and absolute that it cannot be confined, either for causes or person, within any bounds." So thought Lord Coke. (4 *Inst.* 36, *and* 1 *Black. Com.* 140.) Such also is the opinion of Chancellor Kent, (1 *Kent's Com.* 448,) in his remarks upon Coke's expression in Bonham's case, and upon that of Lord Hobart, in *Day* v. *Savage*, and of Lord Holt, in *The City of London* v. *Wood*. Names, eminent as jurists and statesmen, are not wanting, who maintain that there are limitations upon legislative power not written in the constitution, which are implied from the nature of popular sovereignty and representative government. I decline to enter that field of inquiry, because for the present purposes, and indeed for any purpose designed to secure property and liberty and life from aggression and misrule, the written limitations will be found amply sufficient, if expounded and applied in a liberal and resolute spirit. They come down to us from magna charta, and are sanctioned and approved by the wisdom and experience of near seven hundred years, and under our system are intended to save absolute inherent rights from the force of legislative

acts which interrupt their enjoyment or impair their value. Among the absolute inherent rights of persons, Mr. Blackstone (1 *Com.* 138) enumerates the right of property, which "consists (he says) in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution save only *by the laws* of the land. And by a variety of ancient statutes it is enacted that no man's lands or goods shall be seized into the king's hands against the great charter and the law of the land; and that no man shall be disinherited nor put out of his franchises or freehold, unless he be duly brought to answer and be forejudged by course of law." The words "by the laws of the land," and "by course of law," here referred to, and the words "due process of law," found in the 6th section of the 1st article of the constitution, are synonymous, and have the same legal import and effect. We shall presently see what this is. England has no written constitution, and therefore parliament is said to be so trancendent in its authority. The provisions of the great charter and the acts of later times, for the protection of life, liberty and property, are statutory regulations, which parliament may repeal or modify at pleasure. They are limitations upon the power of the crown, and not upon that of parliament. The masses in Great Britain have never yet attained to the consequence and dignity of a contest for their absolute inherent rights, except through the legislative and the judicial branches. It is a historical truth, that the struggle there has constantly been to put the real or pretended prerogatives of the crown under restraint; sometimes by the barons, as in the time of the great charter; sometimes by the judges, as in the time of Lord Coke; and sometimes by the parliament, and especially the house of commons, as in the times of the great rebellion, and the act for the settlement of the succession in 1688. We have incorporated the prohibitions of the English statutes for the protection of life, liberty and property into our constitution, not as limitations upon executive authority, but as limitations upon legislative power. The same unrestrained dominion over property which the parliament and people of Great Britain have denied to the crown and reserved

to parliament, the people of the state of New York have denied to the legislature and reserved to themselves.

The latter clause of section 6 of the 1st article of the constitution is in these words: "No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal cause, to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." These provisions are not to be narrowed down by a literal construction. They are to be largely and liberally expounded. Their object is to secure the enjoyment of the rights to which they refer, and must have an interpretation which will effect that object. The terms "life," "liberty," "property," and "due process of law," as they stand in the section, become of vital consequence in giving it a construction. To be of any real value, they must have a fixed, permanent signification—one that shall remain unchanged by circumstances, or time, or the caprice of those to whom the restraining words of the section may become offensive or troublesome. The legislature may declare what a particular term or expression means when used in a statute. This is a customary and unexceptionable act. But it cannot declare what the same term or expression means, and thus enlarge or restrain its signification, when used in the constitution. It is of no consequence what the legislature think of it, or what import they attribute to it. The real inquiry is, what did the framers of the constitution mean by it? and what was its known legal definition and signification when the constitution was adopted? The word "property" must comprehend now whatever it comprehended in 1846. Any other rule would place at the absolute disposal of the legislature every right intended to be secured and consecrated by the limitations I have quoted. The right of property, as we have seen, consists in the "free use, enjoyment and disposal." Its incidents are the enjoyment, use and the power of disposition. How are we to designate, classify or define an interest or an estate which cannot be used, enjoyed, or sold and tranferred? By what words and expressions shall we

impart to others our idea of its nature and qualities? There can be no property, in the legal and popular sense of the term, where neither the owner, nor the person who represents the owner, has the power of the sale and disposition. That which cannot be used, enjoyed or sold, is not property; and to take away all or any of these incidents, is in effect to deprive the owner of his right of property. This is precisely what the act "for the prevention of intemperance, pauperism and crime" is intended to accomplish, and precisely what it will accomplish if it can be enforced, for it declares that the subject to which it refers shall neither be sold or kept for sale or with intent to be sold. The statutes may—and it is their office to—prescribe the forms by which sales may be effected; that the title to real property shall only pass by deed, acknowledged before an officer, or attested by a witness; that personal estate shall only pass by delivery in writing or the payment of purchase money; that poisonous drugs, when sold, shall be so labeled. They may also declare that intoxicating liquors shall not be sold to minors, paupers or habitual drunkards, or to be drank in the house of the seller, or by retail to be taken out of the house, unless he have a license and be of good moral character, &c. These are mere acts of regulation and conservation, and do not in the least impair the right of property.

There is another right incidental to the right of property which, when abrogated or suspended, tends to the deprivation of property. That is, the right of action, the right to the protection of the laws, and to redress by the legal tribunals. The forms of action and of legal proceedings, the mode by which civil injuries are redressed and rights asserted and defended in the courts, are classed as remedies, and are doubtless subject generally to legislative supervision and control. But when the law-making power comes to deal with the absolute inherent rights referred to in the 6th sec. of the 1st art. of the constitution, forms and modes of proceeding from being mere remedies rise to the dignity of rights which cannot be denied or withheld. The principle is asserted by Mr. Justice Washington, in *Green* v. *Biddle*, (8 *Wheat.* 1, 75,) in the following language:

'Nothing can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy, &c. or which clogs his recovery of possession by conditions and restrictions tending to diminish the amount and value of the thing recovered, impairs his right to and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure according to the nature and the extent of such restrictions." Blackstone, in his Commentaries, vol. 1, p. 55, says: "The remedial part of a law is so necessary a consequence of the two former [the declaratory and directory parts] that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering or asserting those rights when wrongfully withheld or invaded This is what we mean properly when we speak of the protection of the law." Mr. Justice Taney, in delivering his judgment in *Bronson* v. *Kinzie*, (1 *How.* 311,) and applying this principle to laws which impair the obligation of contracts, says: "Although a new remedy may be deemed less convenient than an old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract; but if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." In *Holmes* v. *Lansing*, (3 *John. Cas.* 75,) Chancellor Kent, speaking the judgment of this court, says: "So long as contracts were submitted without legislative interference to the *ordinary and regular course of justice*, and existing remedies were preserved in substance and with integrity," the constitution was not violated. And Judge Denio, in pronouncing the judgment of the court of appeals, in *Morse* v. *Gould*, (1 *Kernan*, 281,) also

says: "It is admitted that a contract may be virtually impaired by a law which, without acting directly upon its terms, destroys the remedy, or so embarrasses it that the rights of the creditor under the legal remedies when the contract was made are substantially defeated." With this necessary qualification, the jurisdiction of the states over the legal proceedings of the courts is supreme. These authorities sufficiently indicate the distinction between rights and the remedial process of the law for their vindication when wrongfully withheld or invaded, and they also define and mark the utmost verge and limit of legislative power when applying remedies to absolute inherent rights which the people have reserved to themselves by the limitations of the constitution. This right of action to redress and protection, by the venders and owners of intoxicating liquors, is seriously impaired—if not in effect destroyed—by the conditions imposed by the latter clause of the 16th section of the act in question.

Those provisions of this act which I have endeavored to show tend to the deprivation of property, cannot, by any process of reasoning, be brought within the meaning of the terms, "by the laws of the land," and "by course of law," used in the English statutes, or the "due process of law," of the 6th sec. of art. 1, of the constitution. Lord Coke says, that the words "by the law of the land," mean by the course and process of law "by indictment or presentment of good and lawful men, where such deeds be done in due manner or by original writ of the common law." "The law of the land, in bills of rights, does not mean merely an act of the legislature, for that would abrogate all restraints upon legislative authority. The clause means, that the statute which deprives a citizen of the rights of person or property without a regular trial according to the course and usage of the common law, would not be the law of the land in the sense of the constitution." (*Hoke* v. *Henderson*, 4 *Dev.* 1.) "The words 'due process of law,' in this place, cannot mean less than a prosecution or suit instituted and conducted according to the forms and solemnities for ascertaining guilt or determining the title to property. It will be seen that

the same measure of protection against legislative encroachments is extended to life, liberty and property, and if the latter can be taken without a forensic trial and judgment, then there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be due process of law." This expressive language of Mr. Justice Bronson, in *Taylor* v. *Porter*, (4 *Hill*, 140,) has often been quoted and cannot be too often repeated. It should be engraven upon the walls of the legislative chambers as a perpetual memorial that there are bounds to legislative authority. See also, the opinions of Judge Denio and of the late Mr. Justice Edwards, in *Westervelt* v. *Gregg*, (2 *Kernan*, 202.) "The prescribed forms and solemnities for ascertaining guilt, or determining the title to property," comprehend as well the forms of procedure as the legal presumptions and rules of evidence by which the guilt is to be ascertained or the title determined. These presumptions and rules are also a part of the remedial process of the law, and their alteration and modification is doubtless, to a certain extent, within the power of the legislature; but in cases which affect the personal rights secured by the constitution, the changes must leave the right unimpaired and place no material impediments or obstructions in the way of those who are concerned in asserting it. In trials for crimes and to enforce penal statutes, the presumption of innocence obtains until it is disproved, in all cases, and in trials to redress civil injuries and enforce civil rights, the presumption of title and right is with the defendant until it otherwise appears, unless in his pleadings he voluntarily assumes the *onus probandi*. In proceedings which aim at the deprivation of liberty and property by fines and forfeitures and the pains of imprisonment, that is not due process of law which reverses the wholesome and humane rules of the common law and substitutes the presumption of wrong and guilt for that of right and innocence. In this respect the provisions of section 17 of the act are highly offensive.

Nor can the force and efficiency of the constitutional limita-

tions be evaded or averted by the declaration of the 25th section of the act, that intoxicating liquors are a public nuisance. In the words of Chief Justice Ruffin, "such a construction would abrogate all restrictions on legislative authority." If a class of citizens can be deprived of a particular kind of property by a legislative declaration that it is a public nuisance, then another class may be deprived of liberty by a legislative act proscribing them as malefactors and felons. Grant this power to the legislature, and the limitations of the constitution are no longer of any value. Every kind of property may be put without the pale of the laws and the protection of the courts, and exposed to seizure and forfeiture by a simple act declaring the proscribed article to be a public nuisance. The existence of such a power is inconsistent with the theory of a limited representative government, because it is destructive of the ends which such government is designed to accomplish. The 25th section proceeds upon a misapprehension of what a nuisance is. Common or public nuisances are offenses "against the public order or economical regimen of the state, being either the doing of a thing to the annoyance of the king's subjects, or the neglecting to do a thing which the common good requires." (4 *Black. Com.* 166.) Impediments and obstructions placed in highways and navigable streams are nuisances *per se*, because they interrupt the passage, and thereby annoy others. Trades and manufactures of certain kinds become nuisances from the places where and the manner in which they are conducted. Animals, such as dogs, swine, &c. are not nuisances until they become offensive by being suffered to run at large or kept in the vicinity of men's habitations. So an accumulation of vegetables and fruits in process of decay, the flesh and offal of animals, gunpowder, drains and sewers in cities and populous places, may or may not become public nuisances by their localities and other attendant circumstances. The true test is, that the thing, trade or business is in some way detrimental to the public, for the elementary writers say, "common nuisances are such inconvenient or troublesome offenses as annoy the whole community in general, and not some particular person." Common nuisances may be

abated or removed by the party annoyed or injured, who is not required to wait for the slow progress of the ordinary forms of justice. Liquors that intoxicate exhibit none of the qualities which constitute a common nuisance. They obstruct no navigable rivers, and impede the passage of no public highways. They create no noise to disturb the public tranquillity and peace. They exhale no offensive odors to taint the air and impair the public health. Nor do they endanger the security of persons or of other property by a tendency to ignition and explosion. In the stores of the importer, the vaults of the brewer and in the cellars of the wine grower and consumer, they are as harmless as the wood or glass in which they are enclosed. He who knows how to enjoy them with reason and moderation, or has the moral courage and self-denial to let them alone, may consider himself free from annoyance and danger. They may be, and doubtless are, converted to base uses—uses which produce "intemperance, pauperism and crime," and, I may add, moral degradation, and grief and anguish unspeakable. And then the places where they are thus used and those concerned in prostituting them to such uses, fall clearly within the province of legislative regulation and control, and the maxim, *sic utere tuo ut alienum non lædas*, applies in all its force. But intoxicating liquors cannot be deprived of the defenses with which the constitution surrounds the property of the citizen, by an act proscribing it as a public nuisance.

There are some observations of Justices Taney and Woodbury, in the opinions delivered by them in the cases against the states of Massachusetts, Rhode Island and New Hampshire, (5 *How.* 504,) which are thought to favor the idea that the states may pass laws prohibitory of the uses and sales of ardent spirits, subject to the right of importation and of sale by the importer. Those who attach any value to expressions which are *obiter dicta* and not necessary to the decision of the precise question under examination, will do well to remember that the language referred to asserts the absence of any thing in the constitution of the United States which forbids the passage of prohibitory laws, and nothing more. The cases in which the

observations occur determined that the excise laws of the several states named in the proceedings did not conflict with the authority given to congress to regulate commerce with foreign countries and among the several states, and nothing else. The power of a state exercising its sovereign authority, is that to which these learned judges refer; but the power of a state legislature, exercising its authority under such restraints and limitations as its constituents may have imposed upon it, is quite a different thing, and one which they did not consider. The question here is not what the legislature might do were these limitations removed or modified, nor what the people of the state might do by an amendment of the organic law, but what the legislature may now do with the limitations in full force.

A distinction has also been suggested between the power of the legislature over property in liquors, acquired and existing at the time the act took effect, and property in liquors, acquired afterwards. The act itself recognizes no such distinction, and does not discriminate between present and future acquisitions, but applies its penalties, forfeitures and disabilities with unsparing rigor to those who now own and to those who may hereafter own such property. In this respect I think it entirely consistent with itself, for a constitutional security which does not cover future as well as present acquisitions is of no practical value, and will afford no sort of guaranty against intentional or mistaken aggression. Here are a class of citizens who have invested their property and spent the best years of their lives in learning and establishing a particular business or trade, inoffensive and commendable in itself, the growth and manufacture, it may be, of wine; the culture of barley and hops, the manufacture of fire arms and gunpowder; the fabrication of types, printing presses and paper; and then comes a legislative act, confessing its incompetency to invade or disturb existing interests, and declares that because wine and the decoction of barley and hops may lead to intoxication; fire arms and gunpowder to war, bloodshed and the destruction of human life; and types, printing presses and paper to blasphemous, libelous and obscene publications, all future acquisitions of the kind shall cease to

be regarded as property, and be no longer entitled to claim the benefit and protection of the laws. Let this fancied distinction between present and future acquisitions once obtain, and property will not hereafter depend for its security upon a permanent rule of constitutional law, but upon legislative moderation and forbearance and such limitations as legislative wisdom and discretion may put upon its own authority. But let us look upon this distinction in another aspect. *Brown* v. *The State of Maryland*, (12 *Wheaton*, 419,) decides that a state law requiring importers of foreign goods, (including liquors) to take out a license before proceeding to sell by the bale or package, is repugnant to the constitution of the United States and void: In other words, that a state has no power to prohibit sales of foreign goods by the importer in the bale or package in which they were imported. It was argued, in behalf of the state, that whenever the goods entered its jurisdiction, the power of congress ceased and that of the state was substituted in its place. Chief Justice Marshall answered the argument in this wise: "Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficiency should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importations be given, unaccompanied with the power to authorize a sale of the thing imported. Sale is the object of importation and is one essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the entire thing, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation but to authorize the importer to sell." Here then is a positive affirmation that the right to sell, by the importer, is a component part of the power to regulate commerce, and that congress may, in disregard of state legislation, authorize the importer to sell. Now, the right to sell by the importer implies the right to purchase by some other person, because there can be no sale

if there is no person to purchase. Had the state of Maryland, in place of prohibiting sales by the importer, gone farther and prohibited purchases from the importer by its own citizens, can there be a doubt that such a prohibition to purchase would have been held equally void as the prohibition to sell, and equally hostile to this exclusive right of congress to regulate commerce? When, therefore, a citizen of the state of New York becomes the purchaser of foreign liquor from the importer, he acquires a right of property under the paramount law of the United States as sacred and secure from legislative invasion and aggression as rights of property which were vested at the time the law under consideration took effect.

If the judgment in the case of *Brown* v. *The State of Maryland*, and the reasoning of the Chief Justice, is entitled to any weight as authority, it is decisive of the question so far as sales of foreign liquors by importers is concerned. The right of importation, we see, means the right to introduce foreign goods into the country, and to sell them to those who may choose to become purchasers. If state legislation can substantially take away from the mass of its citizens the power to become purchasers, a state can in effect impede foreign trade and put an end to foreign importations. It has only to declare what the act under examination declares; that the importer shall only sell in the original packages, to such persons as the state may license and authorize to become purchasers. Sale is no longer incidental to importation. The importer's right to dispose of his goods in the market no longer depends upon the authority given to congress to regulate commerce and intercourse with foreign countries. But it depends also upon the disposition of the state to suffer their citizens to become purchasers of foreign commodities. I am unable to perceive any difference between state resistance to foreign importations by interdicting sales by and purchases from the importer, and resistance by a preventive force stationed upon its own borders. Either mode is an unwarrantable interference with a subject of legislation over which congress has exclusive control and dominion.

The laws which prohibit intermural interments, referred to

upon the argument, stand upon the intelligible and constitutional ground of police regulations to prevent nuisances. (*Coates* v. *The Mayor &c. of New York*, (7 *Cowen*, 585.) And the statutes which authorize the destruction of buildings to arrest the progress of fire or the ravages of pestilence, are justified by the law of over-ruling necessity, and are the exercise of a natural right to avert a great public calamity. (2 *Kent's Com.* 338. *Russell* v. *The Mayor &c. of New York*, 2 *Denio*, 461.)

I therefore arrive at the conclusion, that so much of the 1st section of the act under consideration as declares that intoxicating liquor shall not be sold or kept for sale, or with intent to be sold, except by the persons and for the special uses mentioned in the act; so much of sections 6, 7, 10 and 12 as provide for its seizure, forfeiture and destruction; so much of the 16th section as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him which shall be purchased, taken, detained or injured, unless he prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him; so much of section 17 as declares that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale; and so much of section 25 as declares that intoxicating liquor kept in violation of any of the provisions of the act, shall be deemed to be a public nuisance, are repugnant to the provisions of the constitution for the protection of liberty and property, and absolutely void.

The proceedings in both the cases are reversed and set aside, and Philip Berberrich is discharged from his arrest.

S. B. Strong, J. This cause [*The People* v. *Toynbee*] comes before us on an appeal by the defendant from a judgment rendered against him by a police justice of the city of Brooklyn, for the alleged violation of the statute for the "prevention of intemperance, pauperism and crime," commonly called the prohibitory act. The complaint was preferred before the justice by a policeman, pursuant to the 12th section of the statute. It stated,

in substance, that on the 17th of July, 1855, the defendant sold, and kept for sale, and had in his possession with intent to sell, in Montague street in the third ward of said city, intoxicating liquors, to wit, brandy and champagne, in violation of the said statute; and that said offense consisted in selling one glass of brandy and one bottle of champagne. When the defendant was brought before the justice, his counsel moved that he should be discharged, on the grounds that it did not appear by the complaint that any crime or offense whatever had been committed; and that the act under which the prosecution had been instituted is unconstitutional and void. The motion was denied. The defendant then said that he did not request to be tried by a court of special sessions, but that he objected thereto, and offered to give bail to appear at the next court having criminal jurisdiction. The justice overruled the objection, declined to receive such bail, and required the defendant to plead to the charge. The defendant thereupon pleaded not guilty. A trial was immediately had before the justice, without a jury; the defendant was convicted, and sentenced to pay a fine of $50 and the costs; and it was adjudged that the intoxicating liquor should be forfeited.

The defendant's counsel objected before the justice that the complaint was defective, because it did not aver that the liquors alleged to have been sold were not liquors, the right to sell which in this state is given by any law or treaty of the United States. If such an averment was necessary, the justice should have dismissed the complaint by reason of the omission. The statute does not direct what the complaint shall contain, and that is, of course, left to the rules of the common law. The complaint is a substitute for an indictment, so far as it relates to substance, and requires, at least, as much particularity—indeed the authorities say more. Mr. Chitty, in his approved work on criminal law, (*vol.* 1, *p.* 281, 2,) says, "It is a general rule that all indictments, upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant *precisely* within it." "And [he adds] not even the fullest description of the offense.

were it even in the terms of a legal definition, would be sufficient without keeping close to the expressions of the statute." In the case of *The People* v. *Allen*, (5 *Denio*, 79,) Beardsley, C. J., says, "an indictment upon a statute must state all such facts and circumstances as constitute the statute offense, so as to bring the party indicted precisely within the provisions of the statute. If the statute is confined to certain classes of persons, or to acts done at some particular time or place, the indictment must show that the party indicted, and the time and place [where and] when the alleged criminal acts were perpetrated, were such as to bring the supposed offense directly within the statute." There can be no doubt as to the principle; it is reasonable and proper, and is not controverted by any respectable authority. The first section of the statute under consideration enacts that intoxicating liquors, except as thereinafter provided, shall not be sold or kept for sale, or with intent to be sold, by any person for himself or any other person, in any place whatsoever. These expressions are certainly very broad and comprehensive, and they are not so restricted by their reference to subsequent exceptions, as to make any negation of such as are included in other sections a necessary part of the description of any alleged prohibition. (*Popham*, 93, 4. *Hawkins*, *b.* 2, *ch.* 25, § 113.) The last clause of the first section, however, declares expressly that the *section itself shall not apply* to liquor, the right to sell which in this state is given by any law or treaty of the United States. The statute does not forbid the sale of all intoxicating liquors. A large class certainly is exempt from the prohibition. It is not necessary that I should consider, in discussing this point, how far the qualification extends, but it is material to the decision of another point involved in this case, and I may as well express my opinion about it here.

The question which has been agitated upon this point is, whether the exception refers to foreign liquors only while in the hands of the importers, and contained in the original cask or vessel, when, according to the decisions of the supreme court of the United States, the right of sale is given by congressional legislation, or to such liquors at all times and in whatever con

dition they may be; in other words, whether it refers to the liquors *themselves* or to their *status*. It must be admitted that the language is susceptible (and I think equally susceptible) of either interpretation. In these cases the rules of construction are different, according to the character of the statutes—whether they are purely remedial or penal. The former is entitled to a liberal, while the latter is confined to a strict construction. A statute is purely remedial when it furnishes additional means of redress to an existing wrong. In criminal cases it applies to something that is already *malum in se* or *malum prohibitum*. It is then creative of the remedy only. As all are in favor of the due punishment of acknowledged crime, we readily admit that statutes designed for that purpose are entitled to a favorable construction. But it is otherwise when the statute creates a new offense. It is then an innovation, often an encroachment upon previous rights, and its correctness or justice is not always conceded, or generally admitted. The rule is, therefore, very properly, that such a statute should be construed strictly; that nothing should be deemed a crime under it but what is clearly and unequivocally defined. No man should be punished for an act (previously lawful) under a new statute, unless it clearly announces to him, beyond any reasonable doubt, that it is criminal. Now the statute under consideration is creating a new offense. True, it was a misdemeanor before, to sell strong or spirituous liquors or wines, in quantities less than five gallons, without a license. But the offense under the revised statutes was only a part of what was rendered a crime under the prohibitory act, and as the latter is integral, it is in effect new, and must be so considered. Applying the principle of construction I have endeavored to illustrate to the qualifying clause of the first section, and taking that by itself, the prohibition would not extend to imported liquors at all. But there is another rule in giving a construction to an expression in a statute equally indicative of two varied meanings, and that is, that the whole enactment must be considered, and if one of the interpretations is consonant to the other provisions and the main scope and design of the act, and the other not, that which is consistent shall prevail. It is not

then a question of strict or liberal construction, but the preponderance produces reasonable certainty. Now, no one, who reads the act in question, and considers its object, can hesitate a moment in coming to the conclusion that the legislature intended to prohibit, mainly, the sale of imported liquors as a beverage. Indeed, the statute would be wholly ineffectual if it did not go to that extent. Instead of being an extension it would be a relaxation of the old system. I think, therefore, that the true way of reading the first section, is as *a prohibition of the sale of intoxicating liquors, not vendible beyond state legislation, in their existing condition, according to the decisions of the supreme court of the United States.* But to whatever extent the vendible liquors may go, their express exemption qualifies the description of those included in the prohibition. Men may still sell intoxicating liquors—all that is charged in the complaint—and yet not be guilty of any offense. It is undoubtedly true that when a statute contains provisos and exceptions, in distinct clauses, it is not necessary to state in an indictment that the defendant does not come within the exception, or negative the provisos it contains. The reason given is, that these are matters of defense, which it is necessary that the accused should aver and prove. But that principle does not apply where, as in this case, the enacting section declares that it is inapplicable to the excepted matters. The statute does not, then, constitute them the subjects of offense; and it is not necessary for the accused to aver or prove any defense until there is proof that he is guilty of what is condemned. In the case of *Rex* v. *Jarvis*, cited in a note to *Rex* v. *Stone*, (1 *East*, 639,) Lord Mansfield said that where exceptions are in the enacting part of the law, it must appear *in the charge* that the defendant does not fall within any of them. And Foster, J., who was an eminent criminal lawyer, remarked that "where negatives are descriptive of the offense, then they must be set forth."

The rules which I have stated are applicable to indictments which are preferred by a grand jury, and where the accused may have the benefit of a fair and deliberate trial by jury. But a greater degree of strictness is required in summary proceedings

before an inferior jurisdiction, which does not afford to the defendants those advantages that the common course of law allows them. In such cases Mr. Chitty says, (*vol.* 1, *p.* 234,) it is necessary to show by negative averments that the defendants are not within any of the provisos or exceptions of the statute It does not cure the difficulty that the defendant is charged with having sold liquors contrary to the form of the statute. That will not aid a defective description of the offense. Nor can the defect be cured by evidence. The evidence must be confined to the charge, and the accused cannot be required to answer any complaint except that which sets out an offense conformably to the rules of law. My conclusion upon this point is, that the complaint was radically defective, and that a conviction upon it cannot stand.

The next objection to the proceeding before the justice is, that by refusing the defendant's tender of bail for his appearance at the next court having criminal jurisdiction, there was in effect denied to him the constitutional right to be tried by a competent jury. The result of the denial was, that if the defendant had been tried by a jury it must necessarily have been before one consisting of six persons, out of twelve to be summoned by the constable.

The jurors for our courts of special sessions are generally taken from the immediate neighborhood, and are liable to be influenced; and their verdict is sometimes controlled by the bias created by a public accusation for the commission of a crime in their own vicinity. They are ordinarily selected too by an officer who has had an agency in the preliminary steps against the accused, and who as is sometimes the case with police officers, may be anxious to procure his conviction. Whereas, the jurors in our higher courts of criminal jurisdiction are designated by responsible town officers; their names are deposited in a box kept by the county clerk, and are drawn by him in the presence of some of the county officers, and they are taken from the whole county. These measures are taken for the purpose of having intelligent and impartial jurors, and they are generally effectual. Besides, it is a matter of some importance

to the accused whether his character, his liberty and his property are made dependent upon the verdict of twelve or of six men. Innocent men have sometimes escaped from the worst of punishment by the voice of a single juror; and in such cases the larger number of course affords the greater protection. It is true, too, that the chance of escape of the guilty is increased by the same means. But in the administration of justice it is at least as essential to protect the innocent as to punish the guilty. The right claimed by the defendant is an important one, and if his claim was well founded, the subsequent proceedings should not have been had, and the judgment resulting from them against the accused was void.

On looking over the entire statute, it seems to me that the provisions relative to the trials under it indicate an intent to confine them to the special sessions. The magistrate who issues the original process constitutes the court; they are identical. The fifth section provides that such court shall not be required to take the examination of the accused, but *shall* proceed to trial as soon as the complainant can be notified. The provisions of the act relative to appeals apply exclusively to judgments in the courts of special sessions, and are mostly inapplicable to trials before the general sessions, or oyer and terminer. Many of them are very important. The right of appeal is given to the complainant as well as the defendant. If the defendant appeals, he is required to give a satisfactory bond that he will not, during the pendency of the appeal, violate any of the provisions of the statute. The ordinary power of amendment, of the appellate court, is considerably increased, and any judgment or verdict against evidence may be reversed on appeal, as (in the words of the statute) "in civil actions." It is not material to inquire here whether verdicts against evidence in civil actions can be reversed on appeal. I am considering the provision simply as indicative of the intention of the legislature. Now if it was designed by constituting offenses under the act misdemeanors, to confer the right to try the accused in the courts of general sessions and oyer and terminer, the legislature would, I think, have made the provisions relative to appeals applicable

to those courts also, otherwise their work would have been but half done. There are other provisions in the statute indicating a design that all trials under it should be had in the special sessions, and not any to the contrary. The rule in these cases is, that when the statute creates a new offense, and particularly describes a method of trial and a punishment adequate to the offense for its violation, the complainants, whether the public or individuals, are confined to the remedies expressly given in such statute.

I am, therefore, inclined to agree with the justice in the conclusion to which he arrived, that so far as the statute went, he could not be required to take the proffered bail. But the more important question arises whether the (in effect) denial of the privilege claimed by the defendant is not violative of the constitutional right of trial by jury. If it be so, the enactment, so far as it relates to compulsory trials in the courts of special sessions, is void.

The constitution of this state which went into operation in 1847, ordains, (article 1, § 2,) that the trial by jury in all cases in which it has been heretofore used, should remain inviolate forever. The language is strong and evinces the importance which was justly attached to the privilege. The terms used in the constitution must be applied according to their meaning at common law, unless a different interpretation is clearly indicated. There is no evidence of any different intent in reference to this provision, nor can any be inferred. A jury, by the rules of the common law, must consist of twelve men. It was therefore very properly remarked by Johnson, J., in *Cruger* v. *The Hudson River Rail Road Company*, (2 *Ker. R.* 198,) that the constitutional provision which I have quoted, imports a jury of 12 men, whose verdict must be unanimous. In reference to the cases to which it refers, and whether they include the subsequently created cases, I will quote from an opinion in the case of *Wood* v. *The City of Brooklyn*, (14 *Barb.* 432,) because it expresses my present sentiments on this subject. "This provision relates to classes and of course includes the individual cases which they comprise. In no other way can constitutional enactments preserve that continued efficacy which is so

essential for the public good. Whenever, therefore, a new case is added to a class it becomes subject to its rules. A crime newly created is subject to any constitutional regulations relative to the class of crimes generally. The constitutional provision refers to usage, and that must control and define its application. It is a matter of public notoriety that accusations for crimes have generally been tried before a jury. If there have been exceptions they have not been sufficiently numerous to affect the general usage. The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions, unless there is something peculiar calling for that application. To allow the legislature to except from the operation of a constitutional provision by direct enactment, a matter clearly falling within its meaning, would sanction a fraud upon the organic law, and might in the end destroy its obligation." These remarks were originally applied to penalties, but in the quotation I have substituted crimes to which they are alike applicable. The sentiments were expressed by me, in 1852, and I cite them with the greater satisfaction as they have recently received the concurrence of three of my brethren. The same principle was applied by Chancellor Walworth to the crime of murder in the case of *The People* v. *Enoch*, decided by the court for the correction of errors. (13 *Wend.* 159.) In his opinion in that case he made the following remark: "Malice was implied in many cases at the common law where it was evident that the offenders could not have had any intention to destroy human life, merely on the ground that the homicide was committed while the person who did the act was engaged in the commission of some other felony, or in an attempt to commit some offense of that grade. This principle is still retained in the law of homicide, and it necessarily follows, from the principle itself, that as often as the legislature *creates new felonies*, or raises offenses which were only misdemeanors at the common law to the grade of felony, *a new class* of murder is created"—(it would probably have been more accurate to have said the previously existing class was enlarged)—"by the application of this principle to the case of a killing of a human being, by a

person who is engaged in the perpetration of a newly created felony. The court and jury in such cases immediately *apply the common law principle*, and the killing is adjudged to be murder or manslaughter, according to the nature and quality of the crime that the offender was perpetrating at the time the homicide was committed." There could not be a stronger case to illustrate the rule that newly created crimes are subject to the incidents of the class into which they are introduced, without any express provision to that effect in the statute. By the terms of the prohibitory act the offense imputed to the defendant was characterized as a misdemeanor. The usage in criminal cases prevailing immediately before, and at the time of the adoption of the constitution, and to which it refers, was undoubtedly conformable to the provisions of the revised statutes which had been in operation since 1830. (2 *R. S.* 711, § 2, 3.) Pursuant to those provisions persons accused of misdemeanors had the *right* in *all cases*, to give bail for their appearance at the next court, having criminal jurisdiction, which must be either the general sessions or oyer and terminer, and in their doing so, or, what was equivalent, making an offer to that effect which was refused, a court of special sessions could proceed no further. That, in effect, secured to the accused at their option the right to be tried by a jury of twelve men, and to be exempt from punishment except by their unanimous verdict. That right was denied to the defendant in the case under consideration. If the prohibitory act called for such denial it contravened the constitutional ordinance and was so far void; or if it impliedly permitted the continuance of the privilege it should have been accorded to the defendant on his demand. So that *quacunque via data*, this objection is fatal to the conviction.

The only remaining question which I deem it proper to consider, is: Whether the act in question, so far as it purports to prohibit the sale of intoxicating liquors to be used as a beverage, is valid. The objection urged against that feature of the act is, that it is an exercise of despotic power, calling for an unconstitutional interference with the *rights of property*. All civilized nations agree in asserting the rights of property, and

holding them sacred, as essential to the prosperity and happiness of man. Sir William Blackstone says, (2 *Com.* 2,) that "there is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property, or that sole and *despotic dominion* which a man claims and exercises over the external things of the world, in *total exclusion* of the right of *any other individual* in the universe;" and Chancellor Kent well remarks, (2 *Com.* 319,) that "the sense of property is graciously bestowed on mankind for the purpose of rearing them from sloth and stimulating them to action; and so long as the right of acquisition is exercised in conformity with the social relations and the moral obligations which spring from them, it ought to be *sacredly protected.* The natural and actual sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections." There are, undoubtedly, visionary theorists who advocate the community of property in small societies; but the general sense of mankind indicates that civilized society cannot exist when the right to separate and distinct property does not prevail, or is not sacredly protected. The people of this state have shown their appreciation of the rights of property, in their organic law, by declaring, (*art.* 1, *p.* 6,) that "no person shall be deprived of life, liberty or property, without due process of law." We are thus as effectually protected in the enjoyment of our property as of our own lives or our liberty. *The protection given to property as well by the sense of mankind as by positive enactment makes no distinction as to its greater or less utility. It extends to whatever has been held and enjoyed as such by custom and usages of the country. No power is given to any man or body of men to discriminate.* We hold our property independently of the varying and sometimes capricious estimates of our fellow men. So universal has been the sentiment in favor of the right, and the determination to support it, that the act

in question is, with a single exception, the only instance of an attempt to legislate any species of property substantially out of existence. The exception to which I allude, is the original abolition of slavery by statute. That institution, however, did not exist, nor were slaves considered as property at common law. If they had been it might have been a grave question whether their owners could have been deprived even of such property without compensation. But at any rate, that was an extraordinary case, having reference to what was generally admitted to be the original rights of man, which the statute was designed to enforce, and cannot be considered as a sanction for the violation of the constitutional protection of property. The protection of any species of property must necessarily extend to its essential and definitive characteristics, especially those which constitute its main value. Otherwise it might be rendered useless in the hands of the possessor, and its protection would be wholly illusory. One of the essential characteristics of property is its vendibleness, especially for the principal use to which it can be appropriated. That necessarily results from the despotic dominion over it which Blackstone ascribes to the possessor. Chancellor Kent says. (2 *Com.* 319,) that the exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself, and for this he quotes Grotius, (*b.* 2, *ch.* 6, § 1.) And again the same learned commentator says, (*p.* 320, *vol.* 2,) "The power of *alienation* of property is a *necessary incident* to *the right*, and was dictated by mutual convenience and mutual wants." This is so entirely in accordance with the general sentiment of mankind and the universal practice, that it cannot be disputed; so far as my information or recollection extends, the present is the first and only attempt to interfere with, and prevent the general right of sale of any species of property. That the manner of selling it may be regulated so long as the right is essentially preserved, there can be no doubt. It is upon this principle that our former laws regulating the sales of spirituous liquors were passed. They were, however, by no means prohibitory of the right. Every man was at liberty to sell in

quantities exceeding five gallons, and a selected class in any quantity. Upon the same principle sales at auction of goods generally, sales by peddlers, and sales by apothecaries of poisonous drugs have been regulated, and sales of deteriorated and unwholesome provisions have been prohibited. These were merely police regulations, and it did not interfere with the ordinary sale of any property in its appropriate condition. So, too, it is competent for the legislature to prohibit the abuse of property so as to make it peculiarly dangerous or deleterious to society. It is on this principle that laws have been passed to prevent the storing of gunpowder in cities, to regulate the construction of buildings so as to prevent unnecessary exposure of lives in crowded places, and to suppress gambling in lotteries or otherwise. In none of these instances is there any interference with the ordinary use of property. There is also a power to prevent or abate nuisances. But to that there must necessarily be a limit. It cannot be extended to the general destruction of any species of property, or of its organic characteristics. If it could go thus far none would be safe. The use of animal food, tea, coffee and fruits, each of which is considered by many to be deleterious, might be prohibited. As the legislature has confessedly the power to adopt police regulations so as to prevent the abuses of property, it may be asked where are the limits to which it can be legitimately applied, and by whom are such limits to be prescribed? It may be very difficult in many cases to draw the line, but that can be no reason for claiming an unlimited power. *The right is simply one of regulation, not of destruction.* When an enactment is clearly destructive of a right, and not simply reformatory of its abuses, there can be no question as to its invalidity. There is no reason for claiming discretionary power in such cases. That can be invoked only in cases of doubt. It can be no sufficient reason for acting clearly wrong in any particular matter that the exact line of separation between the right and the wrong cannot be easily defined. Upon the whole, my impression is that the right of property extends not only to its corpus, *but to its ordinary and essential characteristics*, of which the right of sale is one, and

that it can be controlled only so far as to prevent its abuse, without destroying such characteristics.

It must be conceded that an unlimited and unrestricted power to take the life, the liberty, or the property of our fellow man, is despotic. And it matters not whether it is lodged in the hands of one or many, or whether the depositories are elective or hereditary, the character is the same. It was contended on the argument by the counsel for the people, that the legislature of this state possess despotic legislative power by reason of the general constitutional grant. To that I cannot assent. It is undoubtedly true that absolute power exists originally in the people constituting a distinct and separate community. It is competent for them to establish for themselves a despotic government in one man, or many men, if they should choose to do so, although an intention to confer absolute power can never be inferred, and certainly not in a country claiming to be free. But the people of this state when they entered the union deprived themselves of the power of establishing any other than a republican form of government. (*Const. of U. S. art.* 4, § 4.) There is not, perhaps, any very accurate description of a republican form of government, but it is generally understood that it cannot be subject to a despotism in any of its public functionaries. The man who is the subject of despotic power, and I care not whether it be in the legislative or executive department, is a slave and not a republican. Liberty and despotism can never exist together. No general grant would confer an unlimited power over the lives, the liberty, or the property of the citizen. It was well remarked by Judge Story in *Wilkinson* v. *Leland*, (2 *Peters*, 657,) that "the fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people." And Judge Bronson said in *Taylor* v. *Porter*, (4 *Hill*, 145,)

'The security of life, liberty and property, lies at the foundation of the social compact, and to say that the grant of legislative power includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consid eration," (conferring legislative power in general terms,) "*clothed the legislature with despotic power. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power.*" But, as I have already remarked, the constitution of this state provides expressly that no person shall be deprived of life, liberty or property without due process of law. This provision is general and applies to and of course limits the power of the legislature. That body can no more deprive any one of his property without due process of law than can a private individual. An act of the legislature is not the due process of law mentioned in the constitution. Those words, as was remarked by Judge Bronson, in the case last cited, "cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property." In other words, a man cannot be legislated out of his life, liberty or property.

That intoxicating liquors were property at the time of the adoption of our state constitution there can be no doubt. They had been for many ages in general use, as well by the prudent and the virtuous as by the reckless and the vicious. To have denied to the farmer his cheerful glass of cider, or to the laboring man when worn down with fatigue, the support of his customary restorative, would have excited as much astonishment and created as much resistance in the old time, as would the denial of tea or coffee to our ladies at the present day. Whether those who have gone before us, including the greatest, wisest and best of their days, were right in thus indulging their tastes, or whether their conduct was indiscreet and deserved

to be characterized as *criminal*, according to the opinion of modern reformers, are not questions for the consideration of the judiciary. I allude to the former practice to show that intoxicating liquors were property with the general assent of mankind.

It was said by Chief Justice Taney, in the license cases from Rhode Island, New Hampshire and Massachusetts, (5 *Howard*, 577,) that "spirits and distilled liquors are universally admitted to be subjects of ownership and property, and therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists;" and Catron, J., remarked, in the same cases, that "ardent spirits have been for ages and now are subjects of sale, and of lawful commerce, and that of a large class throughout the civilized world, is not open to controversy. So our commercial treaties with foreign powers declare them to be, and so the dealings in them among the states of this union recognize them to be." That such liquors are property still admits of no doubt. Their importation from foreign countries is expressly sanctioned, and they are heavily taxed by congressional legislation. If the acts of congress had been legitimately passed by the legislature of this state, we should have been virtually precluded from denying the characteristics of property to what we had directly admitted within our borders and subjected to taxation. The faith of states, which should ever be preserved inviolate, would have forbidden it. We are equally, though possibly not as directly, concluded by the acts of a general government, of which by our own volition we are a member. Intoxicating liquors are still freely admitted and heavily taxed; and their sale by the importer, while in the cask or vessel in which they were introduced into the country, and their purchase by any one, are authorized beyond the reach of state legislation. It is true that their subsequent sale was, at the time of the adoption of our state constitution, subject—and no doubt lawfully subject—to the regulations contained in our excise laws. The supreme court of the United States has decided, on various occasions, that state laws regulating sales of intoxicating liquors are not prohibited by the constitution or

laws of the United States. Some of the judges, in the license cases from three of the New England states to which I have alluded, expressed opinions that state laws prohibiting entirely the sale of intoxicating liquors, might not conflict with the powers conferred upon and exercised by the general government; but the decision of that question was unnecessary, as it was admitted by the judges that the statutes of those states were not prohibitory. The remarks of those learned judges as to the right of the states to pass laws prohibiting the sale of foreign liquors, had no reference to the limitation of the power of the legislature of the states by their own constitutions; and, besides, they were mere *obiter dicta*, as they were upon a question not at all involved in the cases before them, and would not, according to a rule they had laid down for their own conduct, at all control them or the court of which they were members, in any future determination. From the considerations to which I have alluded, I have no doubt but that imported liquors are still, as they always have been, property.

As to liquors of domestic origin, there are other and possibly more difficult questions. The control of the state over them has not been, nor unless they are introduced from other states can it be, subject to congressional legislation. Whether it is competent for the legislature to prohibit their manufacture in this state, is not now a question, as that has not been done. They can yet be lawfully manufactured, and when manufactured are still property, and as such are, equally with imported liquors, protected by the ægis interposed by our state constitution.

It is clear, as I have before intimated, that the protection to property extends to and includes its generally conceded characteristics, especially those without which it would be valueless; otherwise it would be but nominal and scarcely that. It was contended, however, by the counsel for the people, that the sale of intoxicating liquors was not prohibited by the statute; that any of them might be sold for medicinal, manufacturing and sacramental purposes, and that foreign liquors might be sold by the importers, in the orignal cask or vessel, to any one. The permitted sales would be very inconsiderable. And the statute

if carried into full and its designed operation would effectually prevent its use as an ordinary beverage by the great mass of the people—the use for which it was mainly designed, and without which it would be of little or no value. It might be accessible to the wealthy, but would be unattainable by men of moderate means. That would create a distinction between the rich and the poor which should ever be avoided in legislation, if it is desirable that our laws should be respected or enforced. It is no matter what may be the pretense, the denial would be a restriction; and that to be just, should operate upon all; if not equally, the inequality should not be the direct and palpable effect of the statute. I consider the statute in question as mainly prohibiting the sale of intoxicating liquors as a beverage, and destructive of its principal value, and with that impression I must adjudge it to be null and void to that extent.

The inviolability of the rights of private property is subject to the prerogative resulting from the eminent domain always existing in the sovereign power to take it for public purposes, on paying an adequate compensation to the owner. But the compensation must consist of a direct and specific remuneration, and not merely of the general good conferred upon the community by the passage of a beneficent law. The prohibitory law does not, nor from the nature of the case could it, make any direct compensation to the owners for the property which it is proposed to sacrifice. So, too, there is necessarily reserved the right of taxation; but the exercise of such right, although it requires the contribution of a portion of what belongs to the citizen, in effect rather increases than diminishes the value of the entire property, by the security which it enables the public to give to all that is retained.

The interest in the question as to the validity of the prohibitory law is not confined to those only who may own the property which it is proposed in effect to render unavailable to the proprietor; it extends to the entire community. If the shield of constitutional protection can be withdrawn from one species of property, any other may be successfully assailed under some specious pretenses, or indeed without any at all. It is by no

means a sufficient answer to this to say that the power over property, which is now claimed in behalf of the legislature, would not be liable to abuse, inasmuch as the members are elected by the people, with whom they retain a community of interests, as they enjoy but a short term of office, and must soon return to the ranks of private life. The patriots of the revolution who formed our national constitution, and the enlightened members of the convention which adopted our state constitution, thought otherwise, and accordingly limited the power of the legislature expressly in several important particulars, and by implication in many others. They no doubt thought, and rightly thought, that the possession of despotic power by any department of our government would be inconsistent with our free institutions, and that the safety of our lives, our liberty and our property, required that they should not be subjected to the arbitrary disposal or control of any man or set of men.

It may be that the ordinary use of intoxicating drinks necessarily leads to their frequent abuse, and that the interests of society require that property in them should be in effect annihilated. If so, they might, and possibly should, be withdrawn from the pale of constitutional protection. But that has not yet been done, nor can it be done by any other power than that by which our organic laws were ordained. Whatever those institutions require, the court must award, as it is the duty of the judges, imposed upon them by their official position, and under the solemnity of an oath, to support the constitution of our common country, and of our own state, from whatever quarter or under whatever pretense they may be assailed.

I have not the slightest wish to extend any protection or encouragement to the habit of inebriation, or to throw any impediment in the way of the good and the virtuous who are so solicitous to arrest its progress. It is an abomination, and should be suppressed (so far as human means can do it) by precept, by example, and by legitimate legislation. But we should go no further, lest we "do evil that good might come." The injunction against that is wise; as the evil is certain, while the production of the good might be, at least, problematical.

The judgment in the court below being erroneous, it must be reversed.

Rockwell, J., dissented from so much of the above opinions as relates to the unconstitutionality of the act. (See next case.)

Judgments reversed.

[Dutchess General Term, July 21, 1855. *Brown, S. B. Strong* and *Rockwell*, Justices.]

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## The People, on the complaint of John E. Vassar, *vs.* Philip Berberrich.

Where an individual is brought before a magistrate, upon a warrant issued for a violation of the act of April 9, 1855, "for the prevention of intemperance, pauperism and crime," the magistrate should take his examination; and if, upon such examination, it appears that no offense has been committed, or that there is no probable cause for charging the accused therewith, he should be discharged. If there is probable cause to believe the defendant guilty, bail should be taken, if offered by the defendant, for his appearance at the next court having cognizance of the offense.

The legislature did not intend, by that act, to extend the jurisdiction of courts of special sessions so far as to compel persons accused of offenses against the act, to submit to a trial before that tribunal in cases where the accused should offer bail for their appearance at the next court of sessions or oyer and terminer at all events.

A court of special sessions is one of limited jurisdiction, deriving all its power from the statute. It can only acquire jurisdiction over the person of the accused upon his request to be tried before it, or his omission, for 24 hours after being required to do so, to give bail for his appearance according to law.

CERTIORARI to a court of special sessions held by the county judge of Dutchess county, to remove a conviction of the defendant, for a violation of the prohibitory liquor law, in selling intoxicating liquor.

*T. C. Campbell* and *John Thompson*, for the people. I. In deciding the case and determining what ought to be done, the rules as to habeas corpus apply fully to certiorari. (2 *R. S.* 564.)

II. No person can sue out this writ, except he is committed, detained, confined, or in some way actually restrained of his liberty. If his object is to review the proceedings of courts, or the sufficiency of papers, his remedy is by appeal or common law certiorari. (2 *R. S.* 564, § 35. *Mercein* v. *The People*, 25 *Wend.* 89. 3 *Hill*, 399.)

III. Nothing can be reviewed on this writ except the sufficiency of the warrant, and whether the county judge had colorable authority to issue it; and the fact whether the law is constitutional cannot properly be decided here by this court. (*In the matter of Prime*, 1 *Barb. S. C. R.* 340, *&c.* *People* v. *Cassels*, 5 *Hill*, 167, 168. *Note to* 3 *Hill*, 659 *Bennac* v. *The People*, 4 *Barb.* 33.)

IV. Is the law constitutional under which the county judge proceeded and the warrant was issued? 1. The power to make laws, in this state, is exclusively in the legislature. (*See art.* 5 *of the Constitution, sec.* 1, 1846. *Also, see art.* 1 *of the same Const. sec.* 17.) The people can make no law, repeal no law, enact no law; they have surrendered all their power into the hands and keeping of the legislature. The people have surrendered their rights as individuals to government, for the purpose of gaining greater rights from government. (2 *Kent's Com.* 448.) 2. What is the limit of this legislative power? We say there is no limit, except the constitution. This must of necessity be so in all constitutional governments. The legislature are made the judges of the expediency of a law, and are quite as good judges as the people at large. *The judiciary are never to judge of the expediency of a law.* (2 *Kent*, 448. *Butler* v. *Palmer*, 1 *Hill*, 329. *Charles River Bridge* v. *Warren Bridge*, 11 *Pick.* 420. *Cochran* v. *Van Surlay*, 20 *Wend* 381.) 3. If then this act does not violate some of the express provisions of the constitution of the state of New York, it is a legal and binding act, and the judiciary cannot declare it uncon-

stitutional because it is deemed inexpedient or distasteful to them.

V. The act is said to violate directly the constitution of the state of New York. 1. It deprives the accused of the common law right to a trial by a jury of twelve men. The provision of the constitution of 1846 on this subject is as follows: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." (*Art.* 1, *sec.* 2.) The provision of the constitution of 1822 is as follows, (being the same precisely.) (*See Const. of* 1822, *sec.* 11, *art.* 7.) The provision in the constitution of 1777 is the same in substance. (*See Const. of* 1777, *sec.* 41.) These constitutional provisions following one after the other the same in each constitution in substance, *only preserve this right in those cases in which it has been heretofore used, not in every case*, not in any unless it has been heretofore used. 2. Trial by jury has not been used in this state before the constitution in any cases where the offense was under the grade of grand larceny, till the creation of the court of special sessions in 1824. And these provisions of the constitution are deemed to have been made recognizing that fact. The right therefore of a trial by jury in no case under grand larceny can be claimed as a constitutional right. It has been given as a matter of justice, and a favor on account of our tenderness towards liberty. (*People* v. *Goodwin*, 5 *Wend.* 251. *Murphy* v. *The People*, 2 *Cowen*, 817, *and the statute and decisions there cited.*) 3. The act giving a trial by jury in cases of all misdemeanors, and creating a court of special sessions, was passed in 1834, and the most that could be claimed would be that the right of a trial by jury was secured in such cases by implication. If this is so, the trial by jury secured at the time of the passage of the last constitution in such cases is given, to wit, a jury of six men. (*In the matter of Newell Smith*, 10 *Wend.* 449. *Cruger* v. *The Hudson River R. R.*, 2 *Kern.* 199.) 4. It is said to violate expressly the provision of the constitution that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury." We say the crime in question is not an infamous crime

No common law misdemeanor was at common law an infamous crime. This question is forever put to rest by the provisions of our constitution, and the revised statutes. (2 *R. S. p.* 707.) "Whenever infamous crime is used in any statute, it shall be construed as including every offense punishable with death or by imprisonment in a state prison, and no other. This same statute (*Id.* 702,) was in force before the adoption of the constitutions of 1822 and 1846, and according to every rule of interpretation of those instruments they must be deemed to have been passed with reference to this statute. This interpretation is strengthened by the fact that the words of the constitution are "capital or otherwise infamous crime." 5. It is said the act itself violates the constitution, and convicts a man of an infamous crime without trying him by a jury, and without giving the benefit of a presentment of a grand jury, by excluding persons from sitting as jurors. This we deny. The provision does not render the person infamous or subject him to a single penalty attached to the conviction of an infamous crime. What are those penalties? They are, (1.) The person cannot be allowed to testify in a court of justice. (2 *R. S.* 701, § 27.) (2.) He is deprived of the right of suffrage. (1 *R. S.* 4*th ed.* 337.) All other rights, persons convicted of infamous crimes enjoy, with other citizens. This provision, therefore, of excluding certain persons from acting as jurors, does not charge a person with any crime, or hold him to answer for one, in any sense whatever. It merely excludes a man because by interest he is incompetent, and nothing more; a right which the legislature have always had and executed. (*In the matter of Smith*, 10 *Wend.* 449. 20 *John.* 460.) 6. The law is said to be unconstitutional, because a state cannot pass a law prohibiting the sale of personal property. We affirm it is perfectly proper to do so, and that the right exists of necessity in all governments. If it is thus unconstitutional, it must be a violation of the *spirit* of the constitution and not the letter. The constitution does not prohibit the legislature from making illegal the sale of property, in words. The relator claims it is not lawful to pass such an act. (1.) Because it is an infringement of private rights. It does not

infringe upon such rights. A man can drink as much as he pleases, and when and where he pleases, under this law. It only prevents one man selling or giving it to another, which is not a private right. The law is a mere police regulation, which every state has a right to make. (5 *How. U. S. Rep.* 573.) All the judges' opinions in the three cases there heard together. (2.) This is not a prohibitory law. It does not prohibit but only regulate and confine the sale. 7. It is insisted that the act violates the constitution of the United States by preventing the sale of imported liquors freely. The United States can only claim the right of a sale by the importer in the original package, and this is secured to him by the present law (*Opinion of Taney, Ch. J.*, 5 *Howard*, 573 *to* 575; *of McLean, J., Id.* 589; *of Woodbury, J., Id.* 620; *of Grier, J., Id.* 631.)

VI. The opponents of the act claim that the exception contained in the 1st section of the act renders the sale of all imported liquors, every where, lawful, and renders it necessary for the prosecution to aver in the complaint that the liquor was not imported. That exception is as follows, viz: "This section shall not apply to liquor the right to sell which in this state is given by any law or treaty of the United States." 1. The fair meaning of these words confines the exception to those cases where some law or treaty of the United States authorizes the sale. 2. As there is no such law or treaty which permits such sale, the section is not altered or affected by the exception. The importer would have a right to sell in the original packages without such exception, and he has it with it. 3. An exception which is not a part of the act itself need not be negatived, in pleading; but to be rendered available must be set up and proved by the party asking its aid. (*Gould's Pl.* 179. *Barb. Crim. Law*, 291.)

*J. F. Barnard* and *H. A. Nelson*, for the defendant.

Rockwell, J. The defendant has been convicted before a court of special sessions, held by the county judge of Dutchess county, of having sold intoxicating liquor in violation of the act

for the prevention of intemperance, pauperism and crime, passed April 9, 1855. It is claimed that the defendant should be discharged from custody,

I. Because so much of the said act as prohibits the sale of intoxicating liquor is void. That such prohibition is an unauthorized invasion of private rights, and a violation of the fundamental law. I entertain no doubt that intoxicating liquor is property, and as such is entitled to the protection of law. In my opinion much labor, learning and logic have been wasted in demonstrating a proposition so perfectly obvious.

The right of property is protected against invasion from the legislative, or any other branch of the government, by the express terms of the constitution. (*Constitution, art.* 1, §§ 1, 6.) But aside from this, it is clear that under every free government there are certain fundamental and inherent rights belonging to individuals which are not solely dependent upon the will of the legislature; and it is unnecessary to examine the written constitution of the state to ascertain whether they are expressly shielded by that instrument from legislative encroachment. The right of personal security, of personal liberty, and private property, do not depend upon the constitution for their existence. They existed before the constitution was made, or the government was organized. These are what are termed the absolute rights of individuals, which belong to them independently of all government, and which all governments which derive their powers from the consent of the governed, were instituted to protect. They are defined as follows: "By the absolute rights of individuals we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it." (1 *Black. Com.* 123.)

From the very nature of our government, there must be a limit to legislative power. The ultimate sovereignty of the state is in the people. The government, in all its departments, derives its just powers from the consent of the governed. The powers of the legislature are not original, or inherent, but are

wholly delegated to them by the people. These powers must be exercised under such restrictions as are expressly contained in the written constitution of the state, or as are necessarily implied from the nature and object of the trust which has been confided to the legislature by their constituents. It is contended that the powers of the legislature are supreme, except where they are expressly limited by the constitution, because the constitution expressly confers upon the senate and assembly all the legislative power of the state. (*Const. art.* 3, § 1.) But this assumes that there is no limit to the legislative power of a free state. To this I cannot assent. I suppose that the powers of the legislature are necessarily limited to those objects for which the government was instituted, namely, the protection of individuals in the enjoyment of their absolute and inalienable rights; and that a law which arbitrarily and unnecessarily contravenes these objects, and wantonly strikes down private rights instead of protecting them, is beyond the scope of legislative competency, and is void. It is a case where agents have transcended the powers conferred upon them by their principals, and the principals are not bound by their acts. And individuals who are aggrieved through the exercise of such usurped powers by the legislature, are entitled to the protection of the judicial department of the government, whose peculiar province it is, to construe laws and pronounce upon their effect and validity.

But while the absolute rights of individuals are better protected, they are not as entirely absolute under government, as in a state of nature. They are subservient to such measures as become necessary for the preservation of the government, its defense against external or internal enemies, or the promotion of the best interests of the whole community. For the protection of the government against external danger, individuals may be compelled to enter the military service, and to subject and expose themselves to the hardships and perils of war. For the protection of society against the consequences of crime, offenders may be deprived of liberty, property or life. Lunatics who become dangerous to others may be imprisoned. Per

sons sick of contagious diseases may be removed to, and placed in, hospitals. Property may be removed or destroyed, or trades suppressed, which endanger the public safety or health. Property may be taken from individuals in the form of taxes, and applied towards the support of the government and its institutions. In short, government is not to be restrained in the exercise of its legitimate powers, which are essential to the public welfare, because the rights of individuals will be injuriously affected thereby.

In cases where private property is directly and specifically taken for the public use, compensation must be made to the owner. But cases are constantly occuring, where individuals are subjected to great and ruinous losses of property through the operation of public measures and laws; but these losses being merely consequential and incidental to the exercise of the legitimate powers of the legislature, the individual injury is not the subject of legal redress. Loss to individuals other than those whose property is directly taken and applied to the public use frequently results from the grading of streets, the construction of canals, bridges, ferries, rail roads and similar improvements; but if the law-making power, in the exercise of its legitimate discretion, decides that such improvements are conducive to the public good, no individual, whose injuries are consequential merely, will be permitted to arrest the action of the government, or will even be entitled to compensation for the injury which he may sustain. (*Radcliff's Executors* v. *The Mayor &c. of Brooklyn*, 4 *Coms. R.* 195.)

We may assume that the legislature of a free state is not competent to pass a tyrannical law. That is, one which restrains the natural rights of individuals, for any other purpose than to advance some public good, or to repress some public evil. The distinction between laws which are tyrannical because they unnecessarily infringe upon the absolute right of individuals, and those which are consistent with civil liberty, although in restraint of natural liberty, is very clearly pointed out by Blackstone, as follows:

"Political or civil liberty which is that of a member of socie-

ty, is no other than natural liberty, so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public. Hence we may collect, that the law which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty; whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations in one or two particular points, will conduce to preserve our general freedom in others of more importance by supporting that state of society which alone can secure our independence." (*Black. Com.* 125.)

The following, among a great multitude of authorities, establish the doctrine that private property is held in subserviency to such laws and measures, as in the exigencies of society become necessary for the promotion of the public welfare. (*Stuyvesant* v. *New York*, 7 *Cowen*, 588. *Vanderbilt* v. *Adams*, *Id.* 349. *Commonwealth* v. *Dana*, 2 *Metc.* 329. *Mayor &c.* v. *Lord*, 17 *Wend.* 285, 295; *S. C. in error*, 18 *id.* 130. *Stone* v. *Mayor &c.*, 25 *id.* 157. *Russell* v. *Same*, 2 *Denio*, 461.)

There is no doubt but that a great number of individuals will sustain serious loss of property and derangement of business through the operation of the prohibitory feature of the law in question. But this consideration is not decisive of the question of legislative competency. The question still remains; Was the passage of the act an exercise of the legitimate discretion and power of the legislature founded upon considerations of public policy, tending to promote the morals, the health and safety of the community, or was it a mere wanton and unnecessary invasion of the private rights of individuals?

Any interference with the right of property is not the primary object of this law. Its object is to prevent intemperance, pauperism and crime. Surely, these are proper subjects of le-

gislation. A law aiming at the prevention of these evils, by regulating, and to a certain extent prohibiting, the sale of intoxicating liquor, has long existed as one of the police regulations of the state. The present law assumes that the former law has been found insufficient to accomplish the ends for which it was designed. That the regulation of the sale of intoxicating liquor having failed to suppress intemperance, pauperism and crime, and the public evils flowing therefrom, it has become necessary to try what virtue there is in prohibition.

Whether the law can be carried into effect; whether the whole result will not be a mere legislative enactment of prohibition, without the power of enforcing it practically; whether the evils at which the law is pointed will not be aggravated instead of suppressed, are matters addressed solely to the discretion of the legislature, and with which the judicial branch of the government has no concern.

The objects of the law are matters in which the whole community are interested. Drunkards, paupers and criminals are burdens upon the public—enemies to the peace, welfare and happiness of society. Can it be doubted that if the traffic in intoxicating liquor was entirely suppressed, their number would be greatly diminished? It is enough, to uphold this law, that its tendency is to prevent the public evils against which it is directed, and to promote the public benefits which it is designed to reach. It is not difficult, by ignoring the whole object and purpose of the law, to make out a very plausible case of legislative encroachment upon private rights. But this is not a just or fair mode of considering it. The great ends of public policy which it was intended to subserve, are clearly within the scope of legislative competency. The public evils which it was intended to suppress, are the most formidable to the peace and welfare of society which those who make or administer the laws are called upon to encounter. Assuming that the legislature have acted in good faith; that they have not wantonly and unnecessarily invaded private rights, under the mere pretense of preventing public evils; I think the question, whether the public benefits are of greater weight or importance than the

individual losses which will result from the prohibition of the sale of intoxicating liquor as a beverage, is one of legislative discretion, and with which the judiciary has no concern. It was for the legislature to determine to what extent it was necessary to interfere with private rights, in order to accomplish the great ends of public policy which they had in view; to array on the one side the serious loss of property and derangement of business which must ensue from the passage of this law, and on the other the appalling statistics of intemperance, pauperism and crime, and then determine whether the public necessity was sufficiently urgent to justify the individual wrong. It is enough, to uphold this law, that its aims and object are proper subjects of legislation, and that its apparent tendency is to promote these objects. The legislature, in the exercise of a legitimate discretion, have decided that in order to prevent intemperance, pauperism and crime, it was necessary to prohibit the sale of intoxicating liquor as a beverage. Whether such necessity in fact existed, and whether prohibition will accomplish the object which the legislature had in view, may be questionable. But these are questions which the legislature were obliged to determine, and even if they have decided them erroneously no appeal lies from their decision to the judicial tribunals of the state. The errors, if any exist, must be corrected by the people through the ballot boxes. If it was clear beyond question that no such necessity existed, or that the law could not accomplish its professed object, then it would present a case of unnecessary and wanton violation of private rights by the legislature, and the aid of the judiciary might properly be invoked for their protection. But these questions have been publicly and widely discussed, good and wise men have differed in opinion with regard to them. and the legislature have deliberately passed upon them, Their decision, I think, must stand until it is reversed by the people acting through the agency of a subsequent legislature.

But it is further claimed that the defendant should be discharged from custody,

II. Because it does not appear, from the complaint under

which he was arrested and convicted, that he sold liquor which was not imported. That, by the true construction of the exception at the close of the first section of the act, the unrestricted sale of all imported liquor is permitted. The language of this exception is as follows. "This section shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States." It is said, that as this clause occurs in a penal statute, and is a part of the definition of the offense which it is the intention of the law to prohibit and punish, it must be *strictly* construed. This may be so. But a *literal* construction of the clause will render it entirely nugatory. The rights of those whose interests are protected by the exception forbid such a construction. There is no law or treaty of the United States by which the right to sell any description of liquor is *given*, directly or indirectly. The right to sell liquor or other property is not given by any law of the United States or the state of New York. It exists as a necessary incident to the right of property, independently of any positive law. It has been held by the courts of the United States, that the right to sell liquor of a certain description, and in a certain condition, is *secured* by the operation of certain laws of the United States against any restraint of the right of sale by state legislation. That is to say, when the act of congress authorizes the importation of liquor, the right of the importer to sell it, results as a necessary incident to the right to import, and is secured to him against any interference on the part of the state legislature, by the paramount authority of congress. The question then is, what description of liquor is it, the right to sell which, notwithstanding any prohibition by the laws of this state, is derived from or secured by the act of congress? It is imported liquor in the casks or packages in which it was imported. The exception from the prohibition is exactly coextensive with the right to sell secured by the act of congress; and the exception was plainly and solely intended to avoid a conflict between the state and federal laws. Any other construction would be so totally at variance with the whole spirit, scope and intention of the entire law as, in my judgment, to be utterly inadmissible.

The rules by which the sages of the law have ever been guided, in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the wisdom of ages. (*Plowden's Rep.* 205.) The resolutions of the barons of the exchequer in *Heyden's case*, were the following: "For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered. 1. What was the common law before the making of the act? 2. What was the mischief and defect against which the common law did not provide? 3. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth? 4. The true reason of the remedy. And it was held to be the duty of the judges at all times to make such construction as should suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief, *et pro privato commodo*, and adding force and life to the cure and remedy according to the true intent of the makers of it, *pro bono publico*." (3 *Reports*, 7.) Surely we are not called upon to reverse these admirable rules for the construction and interpretation of statutes, and so to construe this act as will certainly and clearly advance the mischief which it was intended to suppress, and suppress the remedy which it was intended to advance.

It is further claimed that the defendant is entitled to his discharge,

III. Because the proceedings against him were in violation of law, and void. I can perceive no substantial error in these proceedings down to the time when the defendant was brought before the county judge upon the warrant issued by that magistrate for his arrest. He then demanded that his examination should be taken, and offered bail for his apperance at the next court of sessions for Dutchess county. This was refused, and he was thereupon tried and convicted before a court of special sessions held by said county judge. In refusing an examination or to take bail for the appearance of the defendant, I think

the county judge committed an error which was fatal to the validity of all the subsequent proceedings against the defendant. The examination of the defendant should have been taken by the county judge; and if upon the examination of the whole matter, it appeared either that no offense had been committed, or that there was no probable cause for charging the defendant therewith, he should have been discharged. If there was probable cause to believe the defendant guilty, bail should have been taken, if offered by the defendant, for his appearance at the next court having cognizance of the offense. (2 *R. S.* 708, 709, 710.)

A court of special sessions is one of limited jurisdiction, deriving all its powers from the statute. The modes in which it can acquire jurisdiction to try a person charged with an offense triable before it, are pointed out by the statute.

In 2 *R. S.* 711, §§ 2 and 3, it is provided that a court of special sessions shall be organized to try such persons, 1st. When such person shall request to be so tried; 2d. When he shall not make such request, and after being required by the magistrate before whom he is brought shall omit for twenty-four hours after being so required, to give bail for his appearance at the next criminal court having jurisdiction.

The court of special sessions held by the county judge, for the trial of the defendant, did not acquire jurisdiction over his person in either of these modes. It is true that the act for the prevention of intemperance, pauperism and crime, does not in terms provide that jurisdiction over the person can only be acquired by such courts of special sessions as it directs to be held in the modes pointed out by the revised statutes; but the act, in section 5, provides that the several magistrates named in that section shall hold courts of special sessions, and shall *exercise the same authority* that may be exercised by justices of the peace in criminal cases, *and by courts of special sessions as the same are now constituted.*

I conclude, therefore, that the legislature did not intend to extend the jurisdiction of courts of special sessions so far as to compel persons accused of offenses against the act in question to submit to a trial before such tribunals, in cases where such

persons should offer bail for their appearance at the next court of sessions or oyer and terminer, at all events. There is no express provision in the act to that effect, and I think that the right of a person thus accused to put in bail, involving as it does the right to have the accusation against him submitted to and passed upon by a grand jury, and the right to have any indictment which may be found against him tried by a jury in the ordinary course of the common law, cannot be taken away by uncertain inference, or doubtful implication.

My opinion therefore is, that the court of special sessions had no jurisdiction of the person of the defendant, that his conviction was void, and that he ought to be discharged from custody.

Brown, J., and S. B. Strong, J., concurred in the judgment of reversal, but dissented from Judge Rockwell's conclusion that the act under which the proceedings were instituted was constitutional.

Judgment reversed.

[Dutchess General Term, July 21, 1855. *Brown, S. R. Strong* and *Rockwell*, Justices.]

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McDonough, appellant, *vs.* Loughlin and Cassidy, respondents.

Where an objection to the competency of a witness examined before a surrogate is not raised there, it will be deemed to have been waived, and will be of no avail on appeal.

Where the subscribing witnesses to a will subscribe their names at the end of a memorandum of erasures and interlineations which is immediately below the attestation clause, this is a sufficient signature by them.

The memorandum is merely a part of the certificate, which, taken together, states that the paper *as altered* was executed by the testator and attested by the witnesses.

Where a testator said to one of the subscribing witnesses, "Mr. McC. [the scrivener) will want you to be a witness to the will;" and the scrivener read the attestation clause to the testator, and asked him whether he wished the persons

present to be witnesses to the will, and he said he did: *Held*, that this was a sufficient *request* of the witnesses to become such.

It is not necessary that a testator should himself formally repeat the words. It is enough if he directly and audibly adopts the language of another, used in his presence and hearing.

The admission and examination of an executor and trustee as a witness to prove the execution of a will, does not annul his appointment of executor, or the legacies to him as a trustee, where nothing is given to him, nor is any appointment conferred upon him, for his own personal use, but all is fiduciary and for the benefit of others.

The fact that the donee of a mere naked power may be entitled to a compensation for his services, does not necessarily render him beneficially interested in the execution of the power.

Nor will the circumstance that an executor is entitled to commissions for his services, render him an incompetent witness to establish the will.

Those commissions are allowed by statute, by way of compensation for the executors' services, and are not a gift under the will.

THIS was an appeal from a decree of the surrogate of the county of Kings, admitting the will of James McDonough, late of the city of Brooklyn, to probate, and determining that Eugene Cassidy was not disqualified from acting and taking letters testamentary as one of the executors of the said will, and that John Loughlin and Eugene Cassidy were entitled to receive letters testamentary as executors of the said James McDonough. On the 2d day of Dec. 1853, Eugene Cassidy appeared before the surrogate and presented his application in writing, setting forth that he was an executor named in the last will and testament of the said James McDonough deceased; that the deceased was, at the time of his death, an inhabitant of the county of Kings, and died there on the 6th day of Oct. 1853; that the said last will and testament related exclusively to personal estate; stating also the names and places of residence of the next of kin of the deceased, and asking that the said last will and testament might be proved, and letters testamentary granted thereon. A citation was accordingly issued, returnable on the 20th day of January, 1854. On that day Eugene Cassidy, the executor, appeared in person and by A. McCue, Esq. his counsel. James McDonough, a nephew of the deceased, also appeared in person and by counsel. The said Eugene Cassidy,

who was one of the subscribing witnesses to the will, was examined as a witness, and testified to the due execution of the will by the testator, in his presence. On his cross-examination he testified that the will was drawn by Mr. McCue, who read the will to the testator and asked him if there was any thing else he wished to insert. The testator said no; that Mr. McCue then said "you sign this as your last will and testament?" and the testator said "I do," and signed it, on the table, by the bed; that the witnesses signed immediately after he did; McCue telling the deponent, at the time, he was to sign the will as a witness; that previous to the signature by the witness, the testator said to him "Mr. McCue will want you to be a witness to the will; he will want three witnesses to it." A. McCue, the other subscribing witness, testified that some additions and alterations were made in the will, after he arrived; that he read the will to the testator, who then signed it; that the testator spoke of its requiring three witnesses; the witness told him that two witnesses were all that were required; and Mr. Cassidy and himself would be sufficient; that the witness read the attestation clause to the testator, and *asked him whether he wished him* (*McCue*) *and Cassidy to be witnesses to the will, and he said he did.* The testator, by the second clause of the will, gave to Eugene Cassidy $1000, "to be applied by him to certain uses and purposes heretofore made known to him, and the carrying out of which I intrust to him.' He then directed his executors to invest various sums, and pay the interest thereof to individuals named, and for charitable objects particularly specified. By the 5th clause he gave to Cassidy the right of presenting three young men to an ecclesiastical education provided for in the will; with power to nominate and appoint, by will, a successor to said power of presentation. And lastly he gave, bequeathed and devised to John Loughlin, Roman Catholic bishop elect of the diocese of Brooklyn, and to the Rev. Eugene Cassidy, all of his estate, wheresoever situate and not particularly devised and bequeathed by said will, for the uses and purposes previously set forth. And he appointed them and the successor of them, executors and trustees of his will; there-

by giving unto them, and the successors of them, such powers as might be necessary to carry into effect the provisions of said will. At the foot of the will was the attestation clause, on the left of the testator's signature; below which was a memorandum of the erasures and interlineations in the will. And the names of the attesting witnesses were subscribed at the end of this memorandum.

The surrogate decreed that the will was duly executed by the testator, who was competent to bequeath personal estate; that the will was a valid will of personal estate, and that the proofs thereof were sufficient. And he ordered that the will, with the proofs and examinations, be recorded; and that letters testamentary should issue to the executors named therein. From this decree James McDonough, one of the heirs and next of kin of the decedent, appealed.

*S. B. Brophy*, for the appellant. I. The will was not executed, or attested, according to the requirements of the revised statutes. (1.) There is no signature of any witness, at the end of the will. The statute requires that there shall be at least two attesting witnesses, each of whom shall sign his name at the end of the will, at the request of the testator. (2 *R. S.* 124, § 32; 2 *Curteis*, 342, 343; 8 *Paige*, 488.) (2.) Signing the memorandum of alterations, is not signing at the end of the will, within the meaning of the statute. (*Maguire* v. *Kerr*, 2 *Bradf.* 254, *and cases there cited.*) (3.) There is no evidence to show that the decedent requested Eugene Cassidy or A. McCue to witness the will.

II. Assuming that the will was duly executed, the surrogate erred in granting letters to Eugene Cassidy, on the ground that he was a necessary subscribing witness to the will. (2 *R. S.* 125, § 42, 3*d ed.*) (1.) The whole interest vests in the executor, on the death of the testator. (9 *Wend.* 302; 2 *Hill*, 181.) An executor has an interest in the estate to the extent of his commissions. (2 *R. S.* 137, § 62. *Burritt* v. *Silliman*, 16 *Barb.* 198. *Taylor* v. *Taylor*, 1 *Rich.* 531. *Tucker* v. *Tucker*, 5 *Iredell*, 161. 4 *Hawks, N. C.* 141. *Dominick* v. *Michael*,

4 *Sandf. S. C. R.* 401. *Judson* v. *Gibbons*, 5 *Wend.* 224.) (2.) The fifth clause of the will gives to Eugene Cassidy the right of presenting three young men to an ecclesiastical education, with power to appoint his successor to this right. This is a beneficial appointment. (2 *Black. Com.* 22, *N. Y. ed.* 1849.) (3.) The statute provides, that a subscribing witness to a will cannot take any interest, because the effect of his testimony would be to secure for himself all the benefits conferred on him by the will. (7 *Barb.* 554. 8 *Adolph. & Ellis*, 215. 16 *id.* 747, 745.)

III. The will was materially altered in several parts, without the knowledge or consent of the decedent; such alterations are presumptively fraudulent. (1.) There is no evidence to show when, where, or at whose instance the alterations were made in the will. Alterations apparent on the face of a will, are presumed to have been made after the will was executed, unless evidence to the contrary is adduced. (*Shallcross* v. *Palmer*, 16 *Adol. & Ellis, N. S.* 747.) Where fraud is apparent the *onus probandi* is thrown with great strictness on those who seek to establish the will. (*Park* v. *Olloff*, 2 *Phillim. Eccl. Rep.* 323. 1 *id.* 187, 493.) (2.) Omitting to produce evidence in elucidation, which is in the power of the party, or within his knowledge, shall be holden to turn every doubt against him. (1 *Stark. Ev.* 34. 3 *id.* 487, 8.)

IV. The cross-examination shows that the attesting witnesses contradict themselves, and each other; their testimony is therefore shaken, and they alone proved the will. In a case pregnant with the appearance of fraud, and resting on the attesting witnesses alone, these witnesses must be beyond suspicion, and if at all shaken in credit, no part of their evidence can be relied on. (1 *Hagg. Eccl. Rep.* 288.) Eugene Cassidy, in whose favor the alterations are, is a legatee, a patron to an ecclesiastical appointment, and executor and a witness to the will. He was the conduit of the decedent's directions to the other witness who wrote the will, and in whose handwriting the alterations were made. Knowledge of these erasures and alterations, is therefore conclusive against both of the attesting wit-

nesses; yet they offer no explanation. If narratives like the present may be written at the end of a will, and signed as an attestation clause, a wide door is thrown open to the most enormous frauds, upon testators and heirs at law. The court should assert a safe general principle, irrespective of any opinion it may form as to the good or bad faith of the witnesses in the particular instance, and so give effect to the spirit of the statute.

*A. McCue* and *H. B. Duryea*, for the respondent. I. The will of the testator is executed in the manner prescribed by the revised statutes. (2 *R. S.* 3*d ed. p.* 124, § 32. *Remsen* v. *Brinckerhoff*, 26 *Wend.* 325. *See* 1 *Denio*, 33.)

II. The respondent, Cassidy, was a competent witness to prove the execution of the will. (2 *R. S.* 3*d ed.* 125, § 42.)

III. If the legacy and devise, to the respondent Cassidy, be void, then he takes no beneficial interest or appointment under the will. The office of executor is not such a beneficial interest or appointment as is contemplated by sec. 42, page 125, vol. 2, R. S. 3d ed. The law vests the whole personal estate in the executor. And an executor and trustee may be a witness to the will under which he takes his appointment. (*Jarmin on Wills*, 2*d Am. ed. vol.* 1, *p.* 106, *and cases therein cited. Phipps* v. *Pitcher*, 6 *Taunt.* 220. *Tucker* v. *Tucker*, 5 *Iredell*, 161. *Valentine* v. *Jackson*, 9 *Wend.* 302. *Babcock* v. *Booth*, 2 *Hill*, 181. 1 *W. Black.* 325. 1 *Douglass*, 139. 12 *East*, 250.)

The decree of the surrogate should be affirmed.

*By the Court*, S. B. Strong, J. The statute would have made the respondent Cassidy a competent witness to prove the execution of the will, even if he would have otherwise been excluded by the rules of the common law. (2 *R. S.* 65, § 50.) The only objection, of any weight, to his admissibility was that he was the applicant to establish the will, and therefore responsible for the costs, in the event of a failure. That objection not having been raised before the surrogate, it must be deemed to have been waived, and can be of no avail on an

appeal. (*Leach* v. *Kelsey*, 7 *Barb.* 466. 1 *Cowen & Hill's Notes*, 256, 266.)

I can see no valid objection to the manner in which the witnesses to the execution of the will subscribed their names. The legislature undoubtedly intended that the certificate of attestation should intervene between the body of the will and the names signed by the witnesses. The memorandum of the erasures and interlineations is merely a part of the certificate. Taken together, it states that the paper *as altered*, was executed by the testator and attested by the witnesses. That, so far as I know, is, and was before the adoption of the revised statutes, the usual practice where there are alterations to the will as at first drawn, and it seems to me is free from objection, and very proper. The alterations in the will in question are quite numerous, and the memorandum is consequently a long one, but that, in the absence of any charge of fraud, can make no difference.

The appellant is mistaken in point of fact in his allegation that there is no evidence to show that the decedent requested Cassidy and McCue to witness the will. Cassidy testified that the testator said to him, "Mr. McCue will want you to be a witness to the will." And McCue swore that "he read the attestation clause to the testator, and asked him whether he wished us (Cassidy and McCue being the only persons then in attendance) to be witnesses to the will, and he said that he did." It surely is not necessary that a testator should himself formally repeat the words. It is enough if he directly and audibly adopts the language of another, used in his presence and hearing. To hold otherwise would be to sacrifice substance to mere unmeaning formality.

I am strongly inclined to think that the admission and examination of Cassidy, as a witness to prove the will, did not annul his appointment of executor, or the legacies to him as a trustee. The statute avoids any beneficial devise, legacy, interest or appointment, to witnesses, (2 *R. S.* 65, § 50,) but the use of the word "beneficial," if it has any signification, indicates that there may be devises, legacies, interests and appointments

to an executor or trustee, which may be sustained, notwithstanding his examination in support of the will. The only question in this case is whether the legacies or appointment are beneficial to Cassidy. Clearly nothing is given to him, nor is any appointment conferred upon him, for his own personal use. All is fiduciary, and for the benefit of others. He will be, it is true, entitled to the commissions allowed by the statute. But that is by way of compensation for his services, and is not a gift under the will. Payment for services (and in most cases of this kind the compensation) is never considered as a gratuity. It is undoubtedly beneficial to have an employment, for a reasonable compensation, but the benefit is not of a character to disqualify a witness, and it is to such only that the statute refers. The revised statutes declare that devises in trust are not necessarily beneficial. They provide (1 *R. S.* 732, § 76) that *powers* are beneficial or in trust, and (in § 79) that a general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any *interest* in its execution. These provisions are certainly antagonistical to the idea that because the donee of a mere naked power may be entitled to a compensation for his services he is therefore beneficially interested.

It has been held in South Carolina, (*Taylor* v. *Taylor*, 1 *Richardson*, 531, *and Tucker* v. *Tucker*, 5 *Iredell's Law Rep.* 161,) that the office of executor is an appointment yielding emolument, and that therefore one named as an executor in a will is an incompetent witness to establish it. And the same principle was adopted in the case of a trustee entitled to compensation, in North Carolina. (*Allison's Ex'rs* v. *Allison*, 4 *Hawks' Rep.* 141.) The same rule has been adopted by this court at a general term in the third district, (*Burritt* v. *Silliman*, 16 *Barb.* 198,) although, as stated by Judge Harris, "with hesitation." But the decisions in the English courts are the other way. (1 *Modern Rep.* 107, *before Lord Hale. Lowe* v. *Jolliffe*, 1 *W. Black.* 365. *Holt* v. *Tyrrell*, 1 *Barnard. Rep. K. B.* 12. *Bettison* v. *Bromley*, 12 *East*, 250.) In the case last cited, Lord Ellenborough said that the point

had been decided, so long ago as Lord Hale's time, that an executor having no interest in the surplus was a good witness to prove the will, in a cause concerning the estate; and this had been followed by other decisions to the same effect. I am inclined to follow the English decisions, as it seems to me they are supported by the better reason. It is true that in England the executor has not, generally, any compensation for his services; but it is taking a very narrow view of the subject to suppose that the statute allowing a meager compensation for what are too often unthankful services, can confer such a benefit as to disqualify an otherwise competent witness. The tendency of modern legislation is to relax the rules of exclusion, and I yield to the spirit of the age where those rules were merely technical, or had no substantial foundation.

The surrogate's decree must be affirmed.

[Dutchess General Term, July 2, 1855. *Brown, S. B. Strong* and *Rockwell*, Justices.]

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## The People *vs.* Crilley.

The sale of *ale* in less quantities than five gallons, without having a license therefor, granted according to the provisions of title 9, chapter 20, of the first part of the revised statutes, is not prohibited by the 15th section of that title, nor declared a misdemeanor by the 25th section.

CERTIORARI to the oyer and terminer of the county of Dutchess, to remove a conviction of the defendant upon an indictment for a violation of the excise law.

*T. C. Campbell*, district attorney, for the people.

*H. A. Nelson*, for the defendant.

*By the Court*, S. B. Strong, J. The defendant was tried on an indictment for a violation of the 15th section of the title

of the revised statutes, relative to excise and the regulation of taverns and groceries. (1 *R. S.* 680.) That section is in the following words: "Whoever shall sell any strong or spirituous liquors, or any wines, in any quantity less than five gallons at a time, without having a license therefor, granted as herein directed, shall forfeit twenty-five dollars." The 25th section declares that all offenses against the provisions of that title shall be deemed misdemeanors. The only proof to sustain the charge was that the defendant had sold one gill of ale, to be drank in his store. The court below charged the jury that "the sale of ale in less quantities than five gallons, without having a license therefor, granted according to the provisions of title 9, part 1, chapter 20 of the revised statutes, is a misdemeanor." To that the defendant's counsel excepted; and whether the court was right or erred in thus instructing the jury, is the only question presented for our determination.

It was decided by this court, in *Nevin* v. *Ladue*, (3 *Denio*, 43,) that ale was included in the terms strong or spirituous liquors as used in the statute, and a conviction founded simply on the defendant's confession that he had sold ale, strong beer or fermented beer, without a license therefor, was affirmed. That case was subsequently taken to the court for the correction of errors. (3 *Denio*, 437,) where the judgment of this court was reversed, on the ground that the defendant's confession was in the alternative, and did not prove that he had sold any thing stronger than common table beer. For that reason the majority of the members of the court of dernier resort who delivered written opinions, declared that the question whether ale or strong beer was within the prohibition of the excise law, did not arise in the case. Although, therefore, the opinions of the late judges of this court, and of Chancellor Walworth, who concurred with them, are entitled to great respect, yet as they were expressed upon a question not necessarily involved in the case before the court, they have not the force of authority, and we are at liberty to adopt and follow our own conclusions.

Clearly, ale is not comprehended within the term wines, as it is generally understood and applied. That term includes

the fermented juice of the grape, and possibly of other fruit. Neither is it a spirituous liquor, as spirits are manufactured by distillation; whereas, ale is produced by fermentation. If it is included at all in the statutory prohibition, it must be under the denomination of "strong liquors." There is no statutory definition of the word "strong," as applied to liquors. Its meaning is a mere matter of inference. I do not agree with the chancellor that our legislature in passing the act were influenced by the phraseology of King James' version of the scriptures, or the language of the Egyptians, the Greeks or the Romans. I doubt much whether the framers of our statutes consult the bible, or the works of any ancient authors, for the meaning of terms, but they are governed in that respect, as I think they should be, by the authority which controls our language, the *present* usage by well informed people. The words "strong" and "weak" are relative terms, both having reference to the medium of the class to which they are applied—one being above and the other below it. The word liquors, as commonly used, includes all that are spirituous, vinous or inferior fermented, including malt. The meaning should not, I think, be extended any further for the purpose of applying relative terms designating the qualities of either class. The strength of liquors and their intoxicating powers depend upon the quantity of alcohol which they contain. Spirituous liquors contain from 53 to 56 per cent, wines from 13 (champagne) to 26 (port) per cent; currant wine and cherry wine over 10 per cent, metheglen about 7¼ per cent, cider (the average) about 7½ per cent, and ale (the average) about 6¼ per cent. (*Brande's Manual of Chemistry*, 1645, 1646.) If the rule of interpretation which I have mentioned should be applied to these liquors, ale being so far below the medium, could not be appropriately denominated strong. I am inclined to think that it is not originally so classed.

After all, perhaps the statute is its own best expositor. The words "strong" and "spirituous" are connected sometimes by the disjunctive, and at others by the copulative conjunction, but both are uniformly prefixed to the term liquors, without any

thing to denote separate or distinct individuality. There is some reason for inferring that both qualifications were designed to characterize the same identical subject matter. The principal objection to this interpretation is that it makes the expressions tautological, but instances of that kind are frequent in our statutes. It would seem too that the term strong was designed to apply exclusively to spirituous liquors, from the subsequent specification of crimes. That would have been superfluous and indeed improper if wines had been previously included as strong liquors. The statute would then have prohibited the unlicensed sale, first of a class, and then of a part of it. Then too in a section of the article of the revised statutes relative to the observance of Sunday, passed at the same time, (1 *R. S.* 676,) there is a prohibition against selling on that day any *ale*, *porter*, *strong* or spirituous liquors. Here, again, if ale had been included in the general expression of strong liquors, its specification would have been unnecessary and improper. The law of Massachusetts Bay, ch. 105, § 2, quoted by the defendant's counsel, makes the same distinction between ale and strong drink or spirits, and it also prevails in the English statute, 26 Geo. 2, ch. 31, § 7, 11.

It was contended by the counsel for the people, however, that the provision in the 29th section of the statute relative to excise, that no person shall be subject to be prosecuted under that act for selling metheglin, currant wine, cherry wine or cider proved that the legislature intended to include other than spirituous liquors and wines in the regulations prescribed by the statute. Currant wine and cherry wine were undoubtedly included in the general term wines, and there was of course a sufficient reason for specially exempting them, if they were to be exempted at all. But the reason is certainly not so clear for excepting metheglin and cider, unless they had been previously included. The counsel for the defendant supposes that they were particularly excepted because spirituous liquors are applied to a considerable extent for their preservation. Possibly that may have been the reason, but provisos and exceptions are frequently inserted in our statutes to prevent the extension of some general term beyond the intent of the legislature, *pro majori cautela;* and it is

very unsafe to apply them in such a manner as to enlarge the meaning of the general provision: and that should never be done when such provision creates a penalty or a crime.

The design of a statute is often illustrative of the meaning of its phraseology. Clearly, in the instance under consideration it was to promote the cause of temperance, by regulating the sale of a portion of the intoxicating liquors in general use. The particular aim would naturally be to prevent the indiscriminate sale of those which were supposed to be the most detrimental. Spirituous liquors were the most dangerous, then wines, and lastly inferior fermented, including malt, liquors. The statutory regulation included all spirituous liquors, and all wines except currant wine and cherry wine, which were deemed to be the weakest and the least prejudicial. The act allowed the unrestricted sale of those two liquors, and also of cider and metheglin. All of those, as we have seen, are stronger than ale, and it seems to me that our legislature could never have designed to sanction the unrestricted sale of those different kinds of liquor, and at the same time to prohibit the free sale of that which was weaker and less prejudicial. That would have been absurd; and although our legislative bodies have sometimes made strange enactments, yet in matters of implication it is better to infer that they intended to act consistently.

In my opinion the conviction in the court below was wrong, and it must be quashed.

Conviction quashed.

[Dutchess General Term, July 2, 1855. *Brown, S. B. Strong* and *Rockwell*, Justices.]

## BOGERT *vs.* HAIGHT.

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A wharfinger and warehouseman, by holding himself out to the public as such, extends a license to enter upon his premises, to all persons having occasion to do so, in connection with that business.

His employment, however, is a merely private one. He is under no legal obligation to allow the use of his wharf or warehouse to every person applying, even if he has suitable accommodations, and a reasonable reward is offered him; but he may limit the general license, or terminate it, in the case of any particular persons, by giving them notice not to come upon the premises.

And after he has given such a notice to an individual, and thereby revoked the license as to him, an entry of the latter upon the wharf is a trespass, for which an action will lie.

The possession of the premises, by the plaintiff, in such a case, is sufficient evidence of his right to bring the action.

APPEAL by the defendant from a judgment of the Yates county court. The action was commenced before a justice of the peace for a trespass, in entering upon the plaintiff's dock or wharf. The plaintiff was the owner of a dock and storehouse at Dresden, on the Seneca lake, used for a steamboat landing, and other purposes. The defendant was the driver of a stage, employed in carrying passengers and freight to and from the landing. About the 1st of November, 1853, the plaintiff forbade the defendant coming upon the dock. Afterwards, and on the 6th or 7th of December, the defendant came on again and refused to leave. For this entry the action was brought. The plaintiff recovered a judgment for six cents damages, and the county court affirmed the judgment.

*Jas. Taylor*, for the appellant.

*E. Van Buren*, for the respondent.

*By the Court*, T. R. STRONG, J. The plaintiff was a wharfinger and warehouseman, and by holding himself out to the public as such, extended a license to enter upon his premises, to all persons having occasion to do so in connection with that business. (*Heaney* v. *Heaney*, 2 *Denio*, 625. *Beardsley* v

*French*, 7 *Conn. R.* 125.) His employment, however, was a merely private one; he was under no legal obligation to allow the use of his wharf or warehouse to every person applying, even if he had suitable accommodations, and a reasonable reward was offered him; but he might limit the general license, or terminate it, in the case of any particular persons, by giving them notice not to come upon the premises. An innkeeper is bound to admit all persons who apply peaceably to be admitted as guests, when he has accommodations; and a common carrier is bound to receive and carry all goods offered for transportation, or all passengers, which he can conveniently carry, upon the usual price being paid or tendered; but this obligation rests upon considerations of public policy applicable to those cases. Upon the same grounds of public policy innkeepers and common carriers are subject to extraordinary responsibility for the safety of property placed in their care. The cases of innkeepers and common carriers, are exceptions to the general rule of law, as to the duties and responsibilities of bailees and persons engaged in business for hire, which allows persons to decide for themselves with whom they will do business, and requires of them only ordinary care and diligence. This general rule applies to wharfingers and warehousemen. The cases are numerous, that the principles of public policy referred to do not embrace them, and that they are bound to exercise only ordinary care in regard to the safety of goods intrusted to them. (*Story on Bailments*, § 444 *to* § 453, *and cases cited. Schmidt* v. *Blood*, 9 *Wend.* 268. *Foote* v. *Storrs*, 2 *Barb. S. C. R.* 326.) And no good reason is perceived, why they should be bound to receive on their premises any persons against their will, after reasonable notice.

If the foregoing views are correct, the plaintiff having revoked the license as to the defendant, the entry of the defendant for which the action was brought was a trespass, and the defendant was liable therefor.

Assuming that the trespass was committed out of the county of Yates, the justice had jurisdiction. (*Graves* v. *McKeon*, 2 *Denio*, 639. *Code*, § 53.)

The possession of the premises by the plaintiff was sufficient evidence of his right to bring the action.

In my opinion the judgment of the justice was right, and that of the county court, affirming it, should be affirmed.

Judgment affirmed.

[Cayuga General Term, June 4, 1855. *Selden*, *Johnson* and *T. R. Strong*, Justices.]

## Mitchell and others *vs.* Worden.

The law does not, in ordinary cases, impose upon a purchaser of property the duty of disclosing to the seller, at or before the sale, the state of his pecuniary circumstances, however desperate they may be, and be known by him to be.

This general principle is applicable, notwithstanding there has been a long course of dealing between the parties, in the course of which credit has been given to the purchaser, and he has punctually performed his engagements; and his insolvency has occurred during those dealings.

No relation of trust or confidence is thereby created, which should entitle the seller to expect of the purchaser, or require of the purchaser, as a legal duty, to communicate to the seller information of his inability to pay all his debts while he continues his business and the management of his affairs.

Therefore, although a purchaser, at the time of making an additional purchase from persons with whom he has been in the habit of dealing, is insolvent, and he well knows his insolvency, and intentionally conceals it from the vendors, by simply withholding his knowledge on the subject, without otherwise saying or doing any thing to mislead, and he still retains the possession of property, and is pursuing his business as before, he is not thereby guilty of a fraud, entitling the vendor to avoid the sale.

But if the purchaser, at the time of making a new purchase, is not only insolvent, and knows himself to be so, but has performed an open and notorious act of insolvency, by breaking up his business and assigning his property for the benefit of his creditors, it is his duty, arising out of his previous dealing with the vendors, to communicate that fact to them, before the sale; and the violation of that duty amounts to a fraud.

A person receiving the property thus obtained, from the purchaser, without paying any thing on account of it, and with notice of facts which render him legally chargeable with knowledge of the fraud, will not be considered a *bona fide* purchaser.

Mitchell *v.* Worden.

MOTION by the plaintiffs for a new trial, upon a case. The complaint alleged that the plaintiffs were partners, doing business as merchants, at Philadelphia; that on the 17th of November, 1853, Edward W. McCabe, a liquor merchant at Auburn, sent an order to the plaintiffs, by mail, directing them to send to him a cask of old pale brandy, of 78 gallons, and a cask of gin; and that on the 23d of November he also ordered six baskets of champagne wine; that on the 2d of December, 1853, the plaintiffs shipped and sent to the said McCabe the brandy and wine so ordered, which were of the value of about $400; that the said brandy and wine were shipped and sent by the usual and ordinary mode of conveyance, and reached the depot and store house of the New York Central Rail Road at Auburn, on or about the middle of December, and the same remained and continued until about the 26th day of that month in the possession and custody of the said rail road company, at said depot, as a middle man between said McCabe and the plaintiffs. The complaint further alleged that at the date of the said McCabe's first order, and prior thereto, he the said McCabe was in straitened and failing circumstances, and insolvent, to the knowledge of said McCabe and the defendant in this action; and at the date of the said second order, he, the said McCabe had, to the knowledge of the defendant, made and transferred to certain assignees his property, for the benefit of his creditors, and was insolvent, to the knowledge of said McCabe and the defendant; and that McCabe concealed said insolvency from the plaintiffs, with intent to defraud them. That at the date of said first order, and prior thereto, and all the time subsequent thereto, up to and until about the 28th day of December, 1853, the plaintiffs were entirely ignorant of the said straitened, and failing, and insolvent circumstances of the said McCabe, and of said assignment by him, and believed him to be in good circumstances, and to be dealing and doing business in good faith, and the said brandy and champagne were shipped and sent to said McCabe by the plaintiffs, in conformity to said orders, in entire good faith, and solely because of their entire reliance upon the supposed good faith of said McCabe, and

their belief in the goodness and sufficiency of the pecuniary and business circumstances and solvency of the said McCabe; and upon an indefinite and uncertain credit therefor. That on or about the 26th day of December, 1853, the defendant, being advised and cognizant of the straitened, failing, and insolvent circumstances of the said McCabe, and of the assignment theretofore made by said McCabe, of his property for the benefit of certain of his creditors, and being advised and cognizant of the absolute refusal which had been theretofore made by said rail road company to deliver up or surrender said brandy and champagne to said McCabe, because of his known insolvency and assignment, and being advised and cognizant of the absolute refusal which had been theretofore made by the assignee of said McCabe, under said assignment, to take or receive said brandy and champagne, from said rail road company, as a part or portion of said assigned property of McCabe, and being advised and cognizant of the non-payment, and existing indebtedness of said McCabe for said goods, and the inability of said McCabe to pay them for the same, and of the same being in the possession and custody of said rail road company, as a middle man between the said plaintiffs and said McCabe, or his said assignee, did wrongfully and fraudulently remove said brandy and champagne from the premises of said rail road company, against their will, and with intent to defeat the right of stoppage in transitu of said property by said plaintiffs, and thereupon concealed and secreted the same from the plaintiffs, and upon a demand which was made upon the defendant, of said property, by the plaintiffs, on the 29th day of December, 1853, and immediately on the discovery of the premises aforesaid, and before suit, the defendant wrongfully and fraudulently refused to surrender or yield up the same to the plaintiff, to their damage $400, and interest from December 29, 1853. The same cause of action was set out, in similar form, in other counts.

The defendant, by his answer, denied each and every allegation contained in the complaint. He also denied that the right, title and property in the said brandy and wine were in the plaintiffs, or in any stranger or third person.

On the trial McCabe was examined as a witness for the plaintiffs, and proved the signing and sending of the orders to the plaintiffs, by him. He further testified: "I afterwards saw the property ordered, in the store house at the depot in Auburn, or I was told it was there; the order, which is not dated, (the first one,) was sent on the 7th day of November, 1853; the goods were worth over $375; the brandy was worth from $4 to $4.10 per gallon, and the casks contained about 80 gallons; the gin I took and used and left the brandy in the car house; there were six baskets of champagne, worth from $14 to $18 per basket; I have been in the habit always of leaving my articles in the car house until I wanted them and then I took them away. The order dated November 23, 1853, was the last order I made upon the plaintiffs; the goods so ordered by me were not paid for; they were obtained on credit; our understanding was six months. On the 21st day of November, 1853, I made a general assignment of my property for the benefit of creditors; I did not at the time of, or prior to the time of sending either of the orders for goods to the plaintiffs, communicate to the plaintiffs the condition of my pecuniary affairs, or that I had made an assignment. I think one of the plaintiffs told me on the 8th of December, that he saw the fact of my assignment advertised. The brandy came on the 8th day and the wine came on the 9th day of December, 1853." On his cross-examination the witness said: "I had not any idea, when the first order was sent, of making an assignment of my property."

It was proved that the goods arrived at the depot about the 9th or 10th of December, 1853, and remained there until the 26th of that month, when they were delivered to a carman by the name of Austin, who had been McCabe's cartman and was in the habit of taking his goods away.

Margaret J. McCabe was then called by the plaintiffs and testified: "I was at home in Auburn in December, 1853; I know the defendant Worden; I had a conversation with the defendant during the month of December last, at my house, relative to the goods then at the rail road depot; the conversation was about my selling the goods to him; I wanted to do

so; I made an arrangement with the defendant and he was to take the goods; I sold him the goods; I sent Austin the cartman to the depot to get the goods and take them to the defendant's; Mr. Worden afterwards told me he had received the goods; Mr. Worden did not pay me for the goods; there were no particular terms of sale; Mr. McCabe was then indebted to Mr. Worden; Mr. Worden was to take up some notes at the bank given by Mr. McCabe; the transfer by me of the goods was made on account of Mr. McCabe's indebtedness to Mr. Worden; think I have a faint recollection of something said about $500, something said about notes; cannot tell exact amount of McCabe's indebtedness to Worden; I told the defendant that John E. Beardsley said defendant was not protected in McCabe's assignment, and he had rather the defendant would have the goods than any one else, and that somebody would have them if the defendant did not have them, and also something said about keeping the defendant still in regard to the assignment; the defendant said he did not want to have any thing to do with the goods; I gave an Irishman the money to pay the freight on the goods; the defendant knew I was going to pay the freight; the goods were part champagne; the defendant told me there were baskets of champagne there; Mr. McCabe was in Rochester at the time of this conversation; the defendant has not at any time since, paid me for the goods." Edward W. McCabe was then recalled by the plaintiffs and testified: "There were two notes of mine indorsed by the defendant which lay in Auburn bank; both notes were due at the time of the assignment made by me; I have not paid Worden in any other way than by turning out this property; notes were both signed by McCabe and indorsed by the defendant; one note was for $225, the other for $200; one was payable in four months, the other in three months."

The plaintiff then proved a demand of the goods, of the defendant, before the commencement of the suit, and a neglect or refusal to deliver.

The defendant's counsel moved the court to nonsuit the plaintiffs on the grounds, (1.) That on the 2d day of December,

1853, when the plaintiffs shipped the brandy and wine from Philadelphia to McCabe at Auburn, the delivery was absolute and unqualified, and the title in and to the same then passed to McCabe. (2.) That the brandy and wine having arrived at the depot in Auburn, was subject to McCabe's order, and the right to stop the same *in transitu* was at an end, and the plaintiffs had shown no property in the goods. (3.) That the fact, if true, that McCabe was insolvent when he ordered the goods, was not evidence of fraud. That there was not sufficient evidence to sustain the action. After argument by the respective counsel, his honor, the judge, granted the motion and nonsuited the plaintiffs. To which decision the counsel for the plaintiffs excepted. And the plaintiffs except to said decision on the grounds, (1.) That the evidence entitled the plaintiffs to a verdict. (2.) That when the plaintiffs demanded the goods of the defendant, the right of stoppage *in transitu* was in force. (3.) That there was sufficient evidence of fraud to go to the jury. (4.) McCabe's title to the goods had passed to his assignees before the transfer to the defendant, and prima facia the evidence entitled the plaintiffs to a verdict against the defendant. (5.) The transfer by Mrs. McCabe of the goods to the defendant was invalid against the plaintiffs. (6.) The bona fides, sufficiency of consideration and notice, were questions that affected the defendant's purchase, and should have been left to the jury.

*Geo. Rathbun*, for the plaintiffs.

*John Porter*, for the defendant.

*By the Court*, T. R. Strong, J. The basis of this action is, that the sales of the property in question by the plaintiffs to McCabe, were obtained by the latter by a fraudulent concealment from the plaintiffs of important facts in regard to his pecuniary circumstances, which it was his duty to disclose to them, wherefore the sales were void; that the defendant is not a bona fide purchaser from McCabe; and that he wrongfully withholds and has converted the property.

In relation to the brandy, a portion of the property, I am satisfied the evidence falls entirely short of sustaining the action. The order for the brandy was forwarded to the plaintiffs some days before McCabe made an assignment; he did not then, as he testified, contemplate making an assignment; it does not appear that he was then insolvent, or that he understood he was so, except as it may be inferred from the mere fact that he soon after made a general assignment for the benefit of his creditors, without any proof of the extent of his inability to pay his debts; there is no evidence of an intention on his part not to pay for the property, or of any fraudulent intent, in making the purchase; and for aught that appears, his circumstances were as good at that time as they had been at any time while he had been a customer of the plaintiffs.

But assuming that McCabe was, at the time of the purchase of the brandy, insolvent; that his circumstances had become reduced during the period he was buying of the plaintiffs from time to time on credit, and meeting his engagements as to payments; and that he well knew his insolvency, and intentionally concealed it from the plaintiffs, by simply withholding his knowledge on the subject, without otherwise saying or doing any thing to mislead; yet retained the possession of property and was pursuing his business as theretofore—he was not, in my opinion, thereby guilty of a fraud, entitling the plaintiffs to avoid the sale. The law does not, in ordinary cases, impose upon a purchaser of property the duty to disclose to the seller, at or before the sale, the state of his pecuniary circumstances, however desperate they may be, and be known by him to be. Although the knowledge may be of the highest importance to the seller, for the protection of his interests, the duty of communicating it is only a moral duty, belonging to a large class of similar duties denominated by Chancellor Kent, "imperfect obligations which are binding in conscience, but which human laws do not and cannot undertake directly to enforce." (2 *Kent's Com.* 4*th ed.* 490.) Parties to contracts must themselves exercise reasonable care to guard against loss, and, in general, that degree of care requires the party giving credit to make

inquiries of the party to whom it is given, at least, in regard to his ability to pay. For a fraudulent misrepresentation by the purchaser, of important facts in respect to his circumstances, accompanied with damage, the law affords a remedy; the sale may be avoided; and an action for the fraud, to recover the damages, will lie. The general principle above stated, that the purchaser is under no obligation to disclose to the seller his insolvency, although known to him, is, I think, equally applicable notwithstanding there has been a long course of dealing between the parties, in the course of which credit has been given to the purchaser and he has punctually performed his engagements—his insolvency having occurred during those dealings. No relation of trust or confidence is thereby created, which should entitle the seller to expect of the purchaser, or require of the purchaser, as a legal duty, to communicate to the seller information of his inability to pay all his debts, while he continues his business and the management of his affairs. If there is an obligation to disclose in such a case, where does it commence? at insolvency, or on the way to insolvency, and at what point, and what proof of knowledge is required? An attempt to extend the protection of the law to purchasers, so far as to impose such an obligation, would work much more injustice than it would remedy.

In relation to the sale of the wine, the other portion of the property in question, there is an additional fact to those which exist and are assumed to exist, in respect to the sale of the brandy, which, upon the question of fraud in the sale, is entitled to much consideration. The order for the sale of the wine was not made until two days after the assignment by McCabe, and when of course he was entirely divested of property. Not only was he insolvent, and known by him to be so, but he had then performed an open and notorious act of insolvency. Was it not his duty, arising out of his previous dealings with the plaintiffs, to communicate that fact to them before the sale. The plaintiffs carried on business at Philadelphia, remote from McCabe, whose place of business was the city of Auburn; they had from time to time for the period of five years, made sales

to him, and he had paid them a great deal of money; their dealings would naturally excite the confidence of the plaintiffs in him, and lead them to expect, at least, that in case of his breaking up his business and assigning his property for the benefit of his creditors, he would on applying to them to make a further purchase, inform them of those facts. I am not prepared to say that to this extent the plaintiffs had not a right to repose confidence in him, and to be protected in so doing by law. I think they had; and that thus far McCabe was under a legal duty, the violation of which was fraud. Here is a plain, well defined limit for the commencement of a legal obligation—a course of dealing calculated to produce confidence, followed by closing business and giving up the property for creditors. Thus far, legal protection can in practice be afforded to sellers without injustice to purchasers. (*Story's Eq. Jur.* §§ 204, 207. *Bench* v. *Sheldon*, 14 *Barb.* 66, *and cases cited.*)

It cannot be claimed, upon the evidence, that the defendant was a bona fide purchaser. He had notice of facts which render him legally chargeable with knowledge of the fraud; and besides it does not appear that he paid any thing on account of the property, or that his situation has been in any way changed.

I do not perceive that the doctrine of stoppage *in transitu* has any relation to this case. If the right existed while the property was at the depot in Auburn, it was certainly at an end after the property came into the possession of the defendant.

A new trial must be granted, with costs to abide the event.

[Cayuga General Term, June 4, 1855. *Selden, Johnson* and *T. R. Strong* Justices.]

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## SMITH *vs.* COMPTON.

An agreement for the submission of matters in difference to arbitration, followed by the arbitrators entering upon their duties—the arbitration being still pending and undetermined—constitutes no defense or legal obstacle, in abatement or in bar, to an action for the same matters, commenced after the making of the agreement.

Such an agreement is a mere authority, revocable by either party, at any time before the case is finally submitted to the arbitrators for decision, subject only to liability for damages.

A justice of the peace cannot be permitted to give parol evidence of what took place before him, *it seems*. But if his docket is afterwards given in evidence the error will be cured.

Parol evidence is inadmissible to contradict the docket of a justice.

A consent of the parties, in presence of the justice, that a cause shall be submitted to the justice conditionally, with a reservation to the plaintiff of liberty to withdraw the suit, is binding on the parties, and if entered by the justice in his docket, it forms a part thereof, and is no more subject to be contradicted than any other part of the docket.

APPEAL from a judgment entered upon the report of a referee. The plaintiff's complaint contained three counts. In the first count the plaintiff claimed to recover for goods, wares and merchandise, sold and delivered to the defendant, specifying the time, quality and value. In the second count, he claimed to recover for money paid, laid out and expended, specifying time and amount; and, in the third count he claimed to recover for two years' work, labor, and services performed, and goods, wares and merchandise sold, and money paid, to the amount of one thousand dollars, and claimed that the defendant was indebted in a balance of five hundred dollars. The defendant, in his answer, denied generally and specifically each and every allegation of the plaintiff's complaint. 2d. The answer set up a counter-claim against the plaintiff for goods, wares &c., and claimed that the plaintiff was indebted to the defendant in the sum of five hundred dollars. 3d. The answer set up a submission in writing to arbitration by the plaintiff and defendant; that the arbitrators entered upon the discharge of their duties, and that the same matters for which this action is brought were still pending and undetermined. 4th. The an

swer also set up in bar of a recovery by the plaintiff, that before the commencement of this action the plaintiff impleaded the defendant in a justice's court before one Lyman S. Kendall; that the plaintiff proved and gave in evidence the same identical account for which this action is brought, and submitted the same to the justice, who rendered judgment in favor of the defendant. 5th. The answer also set up in bar the commencement of an action by the plaintiff against the defendant, in a justice's court, before one Lyman S. Kendall, to recover the value of a wagon sold by the plaintiff to the defendant, before the commencement of this action which, was the wagon specified in the complaint; that a trial was had, the same was submitted to the justice, and judgment rendered for the defendant. The plaintiff replied to the several matters contained in the answer, denying the same either specifically or generally.

On the trial before the referee the defendant produced a written submission to arbitration, executed by the plaintiff and defendant, before the commencement of this action, of all matters in controversy in this action. The plaintiff admitted the execution of the instrument.

The defendant offered in evidence the said written submission, and then to follow it up by showing that the said submission and matters were still pending and undetermined before the arbitrators. The plaintiff's counsel objected to the evidence, upon the ground that the defendant in his answer having set up matters in bar of the plaintiff's action had thereby waived all matters in abatement of said action, and the referee sustained the objection; the defendant's counsel excepted. The defendant's counsel then offered to prove the further fact, in addition to the above, that the arbitrators in the said submission named, in pursuance of the submission, entered upon the discharge of their duties, as such arbitrators, and that the said matter was still pending and undetermined. The plaintiff's counsel objected, upon the same grounds, and the referee sustained the objection; to which decision the defendant's counsel excepted. Lyman S. Kendall was then sworn, on the part of the defendant, and testified, "I was an acting justice of the

peace, in the town of Tyrone, in April, 1852. The plaintiff commenced an action against the defendant by summons on the 6th of April, 1852, returnable on the 16th of April. On the return of the summons the parties appeared and issue was joined. The plaintiff complained in writing for a wagon sold and delivered, a wagon taken and sold, and for the use of a wagon, and demanded judgment for $100. The defendant's answer, which was in writing, denied each and every allegation, and set up a counter-claim." The defendant's counsel then asked the witness what further took place before him on the trial. The plaintiff's counsel objected to the justice's giving parol testimony of what took place before him, upon the grounds that his docket was the highest evidence, and should be introduced, to prove what took place before the justice. The referee sustained the objection, and the defendant's counsel excepted. The defendant's counsel then read the justice's docket in evidence. Among other things, the docket contained the following entry: "May 1st. H. C. Vanduzer appeared for plaintiff, defendant appeared personally, and proceeded to try the cause. Witnesses sworn," &c. "By a stipulation of plaintiff's and defendant's counsel it was agreed that when plaintiff returned he should have the privilege of withdrawing the suit. May 3d. Plaintiff withdrew the suit and judgment was rendered against plaintiff for $1.97 costs." The defendant's counsel then offered to show, by the justice, that Smith, the plaintiff, came home on the same day of the trial and after the same was closed on Saturday, and that the justice informed him of the trial and stipulation, that he had a right to then withdraw the suit and called on him to know what he was going to do about it, and that Smith then declined to withdraw it. The plaintiff's counsel objected to the evidence, upon the ground that the justice could not give parol evidence to contradict his docket, and upon the further ground that the defendant's counsel, having introduced the docket in evidence, was concluded by it, and had no right to introduce evidence tending to impeach it, and the referee sustained the objection, and defendant's counsel excepted. The defendant's counsel then offered to prove by the justice that

on Monday in the forenoon the justice called on the plaintiff, Smith, again, to know whether he was going to withdraw the suit or what he was going to do, and that Smith then declined to withdraw it; that in the afternoon of the same day, Smith came to the office of the justice, and told the justice he would withdraw the suit, and the justice entered judgment as appeared in the docket. The plaintiff's counsel objected to the evidence, upon the same grounds, and the referee sustained the objection. Defendant's counsel excepted. The defendant then offered to show by the justice that after the witnesses were sworn the cause was abolutely and unconditionally submitted to the justice, on the first day of May, 1852. The plaintiff's counsel objected to the evidence, upon the same ground, and the referee sustained the objection, and the defendant's counsel excepted. The defendant's counsel then offered to show by the justice that the entry on the docket, in relation to the stipulation, was made by the justice by the directions of the plaintiff, and his counsel, after the third day of May. To which the plaintiff's counsel objected, and the referee sustained the objection and the defendant's counsel again excepted.

The referee found the following facts: The plaintiff was in the employment of the defendant as clerk, one year and eleven months, ending 31st March, 1851, and that his services were worth at the rate of $375 a year, amounting to the sum of $718.75. That between the 31st day of March, 1851, and the time of the commencement of this action, the defendant appropriated and converted to his own use, a two horse lumber wagon, the property of the plaintiff, without any express contract for the purchase thereof; that said wagon at the time of such conversion was worth the sum of $40, and as a conclusion of law thereupon, the referee found that the defendant became and was indebted to the plaintiff at the time of the commencement of this action and for the said wagon so sold and delivered to him, in the sum of $40, making the total amount of the plaintiff's account proved, $758.75. The defendant proved a book account against the plaintiff, amounting in all to the sum of $563.62, and leaving a balance due to the plaintiff of $195.13. The defendant

also proved that the plaintiff commenced an action against him before Lyman Kendall, Esq. a justice of the peace of the county of Steuben, sometime in April, 1852; that on the 16th of April aforesaid, the parties appeared by counsel, and the plaintiff put in his complaint in writing, in one count whereof he complained against the defendant for the conversion of a wagon, in another for the sale of a wagon, and in another for the use of a wagon, and claimed damages to the amount of $100. The defendant's answer denied the plaintiff's claim, and set up a counter-claim, and claimed damages to the amount of $100. The cause was thereupon adjourned by the consent of the parties to the first day of May then next, at the office of the said justice in Tyrone, at which time and place the plaintiff appeared by counsel, and the defendant in person, and proceeded to try said cause. That after the evidence was closed on both sides, the plaintiff being absent, by a stipulation between the plaintiff (by his counsel) and the defendant, it was agreed that when the plaintiff returned he should have the privilege of withdrawing said suit. That on the 3d day of May, 1852, the plaintiff withdrew the suit, and judgment was rendered against him for $1.97 costs. The referee also found as fact, and as a conclusion of law from the preceding facts, that the said cause was not "finally submitted" to the said justice to be decided by him on the merits. And he found as further conclusion of law, that the judgment so rendered by the said justice was not a bar to the plaintiff's claim in this action, nor any part thereof, and that the plaintiff was entitled to judgment against the defendant for $195.13, besides costs.

*D. J. Sunderlin*, for the appellant.

*Seely & Wolcott*, for the respondent.

*By the Court*, T. R. Strong, J. An agreement of submission of matters in difference to arbitrators, followed by the arbitrators entering upon their duties—the arbitration being still pending and undetermined—constitutes no defense, or legal ob-

stacle, in abatement or in bar, to an action for the same matters, commenced after the making of the agreement. Such an agreement is a mere authority, revocable by either party, at any time before the case is finally submitted to the arbitrators for decision, subject only to liability for damages. It is not a bar to a subsequent action, because it does not determine the right of action before an award is made, and no sufficient reason is perceived why it should preclude an action by operating in abatement of it. A former action for the same cause is, in general, a ground of abatement. The reason given in *Gould's Pleading*, (*ch.* 5, § 122, *p.* 283,) is, that "the law, which abhors a multiplicity of suits, will not permit a defendant to be harassed by two or more actions for the same thing, where a complete remedy might be obtained by one of them. The object of the rule is to prevent vexation." This reason has but little if any force, in reference to a pending submission to arbitration. The agreement of submission, as has already been observed, is a mere revocable authority; the plaintiff in the action can have no security that his adversary will not revoke it; and if the arbitration should proceed to an award, there is no mode, in the case of a common law arbitration, of enforcing the award but by action, when for the payment of money. This is very far short of the complete remedy obtainable by an action founded upon the original cause of action. Besides, very little vexation comparatively, can be accomplished by the submission; not sufficient to require that protection should be afforded by making it pleadable in abatement. But there is another reason why a submission to arbitration is not available in bar or abatement of a subsequent action for the same cause embraced in the submission. The principle is well settled, that a specific performance of an agreement to refer a subject of controversy, will not be enforced by the courts, on the ground that it is against public policy thereby to exclude parties from a resort to the proper judicial tribunals. (*Story's Eq. Juris.* § 1457, *and cases there cited. Haggart* v. *Morgan*, 1 *Selden*, 422.) Upon the same principle, when an arbitration has been entered into which is still pending—the case not having been submitted for final de-

cision—it will not be allowed to affect the right of either party to seek and pursue a remedy for the same matter in a court of justice.

The doctrine that the submission of a pending action operates as a discontinuance, has nothing to do with the question considered. The ground of discontinuance in such a case is, that by the submission the parties voluntarily provide another mode for the trial than that prescribed by law in the action, and thereby substantially agree to, and do, withdraw the cause from the court; to which agreement there can be no valid legal objection.

The decision, excluding parol proof by the justice of what took place before him, if erroneous, did no harm, as his docket was immediately given in evidence; but I am inclined to think it was correct. (*Boomer* v. *Laine*, 10 *Wend.* 525. *Brotherton* v. *Wright*, 15 *id.* 237. *Heermans* v. *Williams*, 11 *id.* 636.)

The evidence offered, in contradiction of the docket of the justice, was, I think, properly rejected. The substance of the entry in relation to the stipulation was, that by consent of the parties the cause was submitted conditionally, with a reservation to the plaintiff of liberty to withdraw the suit, which consent was, in my opinion, binding on the parties, and properly formed a part of the docket. (2 *R. S.* 269, § 244.) It was no more subject to be contradicted than any other part of the docket. (*Hard* v. *Shipman*, 6 *Barb.* 621. *Brintnall* v. *Foster*, 7 *Wend.* 103. *McLean* v. *Hugarin*, 13 *John.* 184.)

Proof of an award was not admissible under the pleadings. It is not alleged in the answer that an award had been made; on the contrary it is averred that the submission is pending and undetermined.

This disposes of all the points made on the argument before us, and the judgment on the report of the referee must be affirmed.

[Cayuga General Term, June 4, 1855. *Selden, Johnson* and *T. R. Strong*, Justices.]

## Elizabeth Jacques, survivor, &c. *vs.* Josiah Short.

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21 649
30a 460
57a 11

Where a lease is executed by husband and wife, of land in which the wife has an estate for life, and the lessee covenants, in terms, to pay rent to both, this of itself is sufficient to entitle the husband and wife to join in an action for the rent; notwithstanding the wife did not acknowledge the execution of the lease and therefore was not bound by it.

One effect of uniting the wife, in such an action, is that upon the death of the husband his interest in the cause of action survives to the wife, and no interest vests in the personal representatives of the husband.

By uniting the wife, the husband signifies his assent to giving her such an interest in the cause of action; and he thereby vests the wife with his interest, in the event of his death.

For this reason the section of the statute which gives to the executors or administrators of a person to whom rent shall have been due and unpaid at the time of his death, the same remedy, by action, for the arrears, which the decedent might have had if living, is not applicable to such a case.

Where land is demised to A., and he conveys the same to B. by deed, without any reservation or reference to the lease, and B. conveys to C. and the latter to D. in like manner, D. acquires all the interest of A., the original lessee, therein, and becomes in law an assignee of the lease; and as such he is liable on the covenant to pay rent.

An assignee is liable on all covenants which run with the land—as covenants to repair, pay rent, &c.—although not expressly named therein.

And he cannot claim any benefit from the omission of the lessor to record the lease. He is chargeable with notice of the lessor's rights; inasmuch as they fully appear in the chain of his own title.

APPEAL from a judgment entered at a special term, after a trial at the circuit. The action was brought to recover rent due on a lease from the plaintiffs Darius Jacques and Elizabeth his wife, to the defendant's grantor. On the 1st of April, 1839, Mrs. Jacques being entitled as the widow of Levi Van Farren, a former husband, to a life estate in certain premises as tenant in dower, and she and her husband, D. Jacques, being in possession thereof, they executed a lease of the premises to Elijah Stephens, for and during the natural life of Mrs. Jacques, at an annual rent of $100. This lease was neither acknowledged nor recorded. The covenants in the lease did not in terms include the "assigns" of either party. On the 25th of June, 1839, Elijah Stephens and wife conveyed the same prem-

ises, without any reservation or reference to the lease or to the claims of the plaintiff, to Samuel Wright. On the 18th of November, 1845, Samuel Wright in like manner conveyed to Calvin Ward, and Calvin Ward on the 2d day of April, 1849, conveyed in like manner to the defendant, Josiah Short. Stephens, from the time the lease was executed in 1839, continued to pay the stipulated rent, until the year 1850. This action was brought upon the lease, by Jacques and wife against Short, for the recovery of the rent in arrear. Darius Jacques died after the suit was commenced.

The action was tried at the Livingston circuit, in May, 1854, before Justice Welles, without a jury. Judgment was given in favor of the plaintiff, for $258.84.

*T. Hastings*, for the appellant. I. The defendant cannot, in this form of action, or indeed in any form of action, be made liable upon the lease, either as the assignee of the term, or otherwise; and the learned judge erred in permitting the lease to be read in evidence, as well as in adopting the conclusion of law that the defendant was liable. (1.) As the joint lease of Darius and Elizabeth Jacques, for the term of her natural life, it has no vitality, for the reason that she, being a feme covert, could not pass the estate without an acknowledgment of her deed. If, on the other hand, the lease is to be upheld as the separate deed of Darius Jacques, then he had no right to create the estate or term for life of the wife. He could only create a term coextensive with the coverture. If the lease is to be regarded as valid to pass the estate during coverture, then the rent in arrear at the time of his death would go to his representatives; and the cause of action does not survive to the present plaintiff. (2 *R. S.* 32, § 21.) All the rent claimed in this action accrued during the coverture, and the present plaintiff could not have maintained an action therefor even against Stephens; much less against a stranger to the contract. (2.) The covenant contained in this lease, on the part of Stephens, is merely personal, and does not run with the land. It does not contain any words of succession such as "executors," "admin-

istrators" or "assigns." It has been so regarded by the parties. Stephens continued to pay the rent as upon a personal covenant nearly eleven years after he had parted with the estate. The defendant is not the lessee in fact or in form; and there is no privity of contract between him and the plaintiff. If he is at all liable, it must be by privity of estate. To constitute this relationship, the covenants in the lease must run with the land; and to make the defendant liable, he must have entered and possessed the estate. The covenants in the lease are between Jacques and Stephens, and do not extend to the assignees of either party, (because not named,) and no covenants can be implied. (2 *Barb. Ch. Rep.* 559. 14 *Wend.* 38.) The covenants in such a lease do not run with the land. (6 *Cowen*, 302. 8 *id.* 266. 4 *Comst.* 134.) No privity of estate can be created under such a lease, except by contract. (2 *Hill*, 444.) The doctrine of a privity of estate, so as to render the assignee liable, does not extend to a grantee of a grantee, that is, beyond the immediate grantee of a lessee; and the defendant being a grantee under several other grantees, is not liable.

II. If the court shall be of opinion that the preceding point is not well taken, then it is insisted that the defendant is protected by the statute relative to the recording of conveyances. (2 *R. S.* 47.) The lease not being recorded, is void as against the defendant, (1.) All the rights of parties to conveyances apply to this case, the lease not being recorded, and not being so executed as to entitle it to be recorded. (2 *R. S.* 40 *to* 47, § 44.) (2.) The doctrines of protection to a grantee with notice from a grantee without notice, and *vice versa*, are fully stated in Clinton's Digest, page 389, §§ 311, 312, 313. (2 *Hill*, 650. 1 *Paige*, 323.) (3.) The defendant had not sufficient notice in fact. Explicit notice must be shown; notice to put a party on inquiry is not sufficient. (1 *Clint. Dig. pp.* 386, 389, §§ 307 *to* 310. 8 *John.* 137. 12 *id.* 452, 8 *Cowen*, 260.) (4.) The estate under the lease was forfeited by the non-payment of rent, and ceased running with the land; and no action can be maintained against the defendant for rent accruing after forfeiture. (21 *Wendell*, 120.) Waiver of the forfeiture dis-

charged the defendant. (5.) The defendant was only liable for the rent accruing while he was assignee. When he parted with the possession he discharged himself. (9 *Cowen*, 88. 3 *Barb. Ch. Rep.* 52.)

*Charles C. Wilson*, for the plaintiff. I. The rulings of the court below upon the admission of evidence were correct. A covenant extends to the heirs and assigns of a party, although not named in the instrument. Actual notice of the plaintiff's title, before purchase by the defendant, may be shown. The interrogatory was a proper one. But it may be true that he did not prove a sufficient notice. (*Jackson* v. *Burgott*, 10 *John. Rep.* 457.)

II. Proof of the defendant's possession of the demised premises is prima facie evidence that he is assignee of the term, and sufficient in connection with the lease to entitle the plaintiff to recover. There is sufficient evidence to warrant the court below in finding that the defendant was assignee of the lessee. (*Armstrong* v. *Wheeler*, 9 *Cowen*, 88. 4 *Hill*, 112. *Durando* v. *Wyman*, 2 *Sand. S. C. R.* 597.)

III. The conveyances, from Peck down to the defendant, operate as assignments of the lease. The lessee could not hold adversely, having taken the lease; and every conveyance must in law have been given under and in subordination to the lease. The presumptions from possession and the deeds must be considered together, and reconciled, if possible. Stephens may have agreed to pay the rent to the plaintiff, but the grantor is, notwithstanding, the assignee of the lessee. (*Childs* v. *Clark*, 3 *Barb. Ch.* 52, 59. 4 *Cruise*, 160, 161.)

IV. That the plaintiff had a life estate in these lands, is admitted. It also appears that her interest was apparent of record. (1.) The defendant held the estate of which the plaintiff's first husband died seised, under and through such husband. (2.) One of his title deeds contains an admission of the plaintiff's title and estate, which estops the defendant from denying notice of the plaintiff's title. (*Jackson* v. *Parkhurst*, 9 *Wend*, 209. *Chautauque Co. Bank* v. *Risley*, 4 *Denio's Rep.* 480.

1 *Clinton's N. Y. Digest*, 474.) (3.) The lease and the submission to arbitration are confessions of the defendant's grantors, and operate to charge him with notice. (1 *Comstock*, 525.) (4.) The possession of the lessee and his assigns is the possession of the lessors, the plaintiffs, and grantees of the estate are bound to take notice of the rights and interests of the person in possession. (5.) R. R. Jacques informed the defendant that his grantor was paying the plaintiff rent for this land. (6.) The lease is one of the muniments of the defendant's title, and follows the estate, and the presumption is that its counterpart is the defendant's possession, received from Stephens, through the intermediate grantees. (7.) It was not the grantors' duty to get the lease recorded; they did not have possession of the lease. The grantee of the estate created by the lease was the person for whose protection and by whom the lease should have been recorded. The object of the registry act is to protect third persons from the subsequent fraudulent acts and conveyances of the grantors, and not to give the grantee and his assigns and privies in estate, notice of the extent and quality of their own estates, as is claimed by the defendant in the case at bar.

*By the Court*, T. R. Strong, J. It was admitted at the trial, that at the date of the lease the plaintiff had title to the demised premises for her life. This title was of course subject to the estate of her husband in the premises by virtue of the marriage, for their joint lives; and it is settled that in an action "for rent or other cause of action, accruing during the marriage, on a lease or demise or other contract relating to the land or other real property of the wife, whether such contract were made before or during the coverture, the husband and wife may join, or he may sue alone." (1 *Chit. Pl. 5th Am. ed.* 20. 1 *Roper on H. & W.* 213. *Reeve's Dom. Rel.* 131 *to* 133. *Decker* v. *Livingston*, 15 *John.* 479.) In this case the covenant to pay rent is in terms to both, which of itself is sufficient to entitle them to join in the action, although she did not execute the lease in such a manner as to be bound by it—the execution

of it not having been acknowledged by her. One effect of uniting the plaintiffs in the action was, that upon the death of the husband the interest in the cause of action survived to the wife, and no interest vested in the personal representatives of the husband. (1 *Chit. Pl.* 21. 1 *Roper on H. & W.* 212.) By uniting the wife, the husband signified an assent to give her such an interest in the cause of action. (1 *Roper on H. & W.* 213. *Reeve's Dom. Rel.* 132.) The statute (1 *R. S.* 747, § 21) giving to the executors or administrators of a person to whom rent shall have been due and unpaid at the time of his death, the same remedy by action for the arrears which the testator or intestate might have had if living, is not applicable; for the reason that the husband had vested the plaintiff with his interest, in the event of his death.

The defendant, by the conveyance to him of the premises, acquired all the interest of the original lessee therein and became in law an assignee of the lease. (*Provost* v. *Calder*, 2 *Wend.* 517. *Armstrong* v. *Wheeler*, 9 *Cowen*, 88. *Acker* v. *Witherell*, 4 *Hill*, 112.) As such he is liable on the covenant to pay rent. An assignee is liable on all covenants which run with the land, as covenants to repair, pay rent, &c., although not expressly named therein. (*Verplanck* v. *Wright*, 23 *Wend.* 506. *Allen* v. *Culver*, 3 *Denio*, 284. *Woodfall's L. & T.* 278.)

The defendant cannot claim any benefit from the omission to record the lease. He is chargeable with notice of the plaintiff's rights, as they fully appear in the chain of his own title.

The views presented cover all the points of the appellants, and in my opinion the judgment at special term should be affirmed.

Judgment affirmed.

[Cayuga General Term, June 4, 1855. *Selden*, *Johnson* and *T. R. Strong*, Justices.]

## FIERO *vs.* REYNOLDS.

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The provision of the statute, prescribing the time within wh ch a venire for a second jury, upon a discharge of the first by a justice, for their failure to agree, shall be made returnable, (2 *R. S.* 245, § 111,) was designed for the convenience of the parties, and a compliance with it may be waived by their consenting that the process be returnable at a later period.

Where the return of the justice, after stating the discharge of the first jury, added "I then proposed to the parties to postpone the cause until the 17th day of May, 1853, at &c., to which neither party made any objection. I then issued another venire," returnable at the time and place proposed; *Held* that it must be inferred, upon the principle that every reasonable intendment is to be made in support of a judgment, that the parties understood the proposition, and said nothing indicating dissent; that the parties were in a position requiring them to express their dissent, or be concluded; and that the omission to object was equivalent to an express consent to the postponement.

In such a case a consent, in express terms, is not necessary.

APPEAL from a judgment of the Cayuga county court. The action was commenced before a justice of the peace, by summons returnable May 7, 1853, and was tried on the 14th of May, before a jury; a venire being called for by the defendant. The jury did not agree, and were discharged by the justice, on the same day, Saturday. The justice stated in his return, that he then "proposed to the parties to postpone the cause until the 17th day of May, (Tuesday,) to which neither party made any objection." There was no other *consent* to this arrangement than such as is to be implied from the *silence* of the parties. On the adjourned day the plaintiff appeared, with his witnesses, and took judgment. The defendant did not appear, but appealed to the county court, and there alleged for error the violation of the section of the statute which provides that when a jury cannot agree, and are discharged, the justice "shall issue a new venire, returnable within *forty-eight hours*, unless the parties shall have consented that the justice may render judgment on the evidence already before him; which in such cases he may do." (2 *R. S.* 245, § 111.)

The county court reversed the judgment of the justice, and the plaintiff appealed to this court.

*Wm. Allen*, for the appellant.

*Jas. R. Cox*, for the respondent.

*By the Court*, T. R. STRONG, J. If the justice erred, in making the second venire returnable more than forty-eight hours after discharging the first jury, it did not affect his jurisdiction; the case was one of mere error or irregularity in the exercise of jurisdiction. But his judgment was subject to reversal for the error, as much so as if he had acted without jurisdiction. (*Hard* v. *Shipman*, 6 *Barb.* 621.)

The provision of the statute, prescribing the time within which a venire for a second jury upon a discharge by a justice of the first for their failure to agree, shall be made returnable, (2 *R. S.* 245, § 111,) was designed for the convenience of the parties, and compliance with it may be waived by their consenting that the process be returnable at a later period. (*Embury* v. *Conner*, 3 *Comst. Rep.* 511, *and cases there cited.*) It is claimed on the part of the appellant, that such consent was given in this case, and that presents the principal question for decision.

The return of the justice, after the statement of the discharge of the first jury, proceeds, "I then proposed to the parties to postpone the cause," to the time to which it was postponed, "to which neither party made any objection." The proposition was to the parties, from which it must be understood that it was heard by them. It is not stated what language was used in making the proposition, or whether or not any thing was said by the parties, or either of them, in answer to what was said by the justice. If the respondent had regarded it as important, he might doubtless, by proper proceedings in the county court, have procured an amendment of the return, in those particulars, but in the absence of more precise information, it must be inferred, upon the principle that every reasonable intendment will be made in support of a judgment, that the parties understood

it, and that neither said any thing indicating dissent. The return next states, "I then issued another venire," returnable at the time and place proposed, and it is a reasonable inference that this was done in the presence of the parties. It thus appears that there was not only the proposition by the justice, but that it was acted upon at the time, with the full knowledge of the parties; and the statement that no objection was made applies to the whole period. Was not this omission to object equivalent to an express consent to the postponement? Were not the parties in a position that required them to express their dissent or be concluded? Could the justice fail to understand the parties as consenting? The proper answers to these questions appear to me to be plain. I am satisfied that both parties intended to, and did in fact, at the time, consent to the postponement. (*Whitney* v. *Crim*, 1 *Hill*, 61. *Kilmore* v. *Sudam*, 7 *John.* 530. *Bullard* v. *Spoor*, 2 *Cowen*, 430. *Ackerman* v. *Finch*, 15 *Wend.* 652.)

It was proper for the justice to return the particulars of what took place before him in relation to the postponement. It is sufficient to sustain his judgment if it is apparent from the return that the consent of the parties was given; and the court will draw the conclusion as to the general fact from the particular facts returned.

The principle of the case of *Taylor* v. *Betsford*, (13 *John.* 487,) is not applicable to this case. It is, that the consent of parties to a justice entering the room where the jury are deliberating, privately and apart from the parties, to answer questions at the request of the jury, will not be inferred from the knowledge of the parties that he was going into the room, and their not making objection; inasmuch as the practice is dangerous and improper, and ought to be guarded against. Here there is no dangerous or improper practice against which it is important to provide. The case referred to, as has been said by the court in subsequent cases, is an extreme one, and the principle ought not to be extended. (*Whitney* v. *Crim*, *above cited*. *Moody* v. *Pomeroy*, 4 *Denio*, 115.) In cases like the present. I

am of opinion that a consent in express terms is not necessary. The judgment of the county court must be reversed, and that of the justice affirmed.

[Cayuga General Term, June 4, 1855. *Selden*, *Johnson* and *T. R. Strong*, Justices.]

## Clark *vs.* Van Vrancken.

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41h 47
41h 580
49h 394

The general doctrine that where a party does not appear he waives nothing, is well settled; but this means, nothing impeaching the jurisdiction or authority of the court to act, and nothing in the way of objection to the proceedings and the competency or sufficiency of evidence on the part of the plaintiff. This is the extent to which the rule has been or can properly be carried.

With the exception of objections to the jurisdiction, and those which arise upon the proceedings and case of the plaintiff, all objections are waived by an omission to appear and make them, in the proper form, before judgment.

An omission to challenge is a waiver of all objection to a juror, in like manner as an omission to plead a defense is a waiver of the defense. And this, whether there be an appearance or not.

Accordingly, where in an action before a justice of the peace, an adjourment took place, after issue joined, and the defendant, although present, did not appear, on the trial; *it was held* that he could not, on appeal from the judgment, raise the objection that some of the jurors who sat upon the trial were not competent, as such, for want of the requisite property qualification.

APPEAL by the defendant from a judgment of the Livingston county court. The action was commenced before a justice of the peace, and, after issue joined, was tried by a jury, who found a verdict in favor of the plaintiff for $100. From the judgment rendered thereon, the defendant appealed to the county court, where the judgment of the justice was reversed. The defendant did not appear, on the trial before the justice, or make any objection to the jurors, or either of them, but in the county court he assigned for error in fact that William Woolever, Isaac Preston and Merrick C. Townsend, and each of them, were not competent jurors, by reason of not having the property qualifications required by the statute.

*R. L. Dorr*, for the appellant.

*J. A. Van Derlip*, for the respondent.

*By the Court*, T. R. STRONG, J. The complaint, in each count, charges an entry upon real estate, and in connection therewith the commission of other acts. In two of the counts the taking and carrying away of personal property, and in the other, making a noise and disturbance, and using indecent language to the plaintiff's family, whereby the plaintiff's wife became sick, and he lost her services. The cause of action, in each count, is the entry on the premises; all the rest is matter of aggravation. (*Howe* v. *Willson*, 1 *Denio*, 181. *Houghtaling* v. *Houghtaling*, 5 *Barb.* 379, 382. *Eames* v. *Prentice*, 8 *Cushing*, 337.) And the proof given upon the trial abundantly established the several causes of action, and most of what is alleged in aggravation.

The defendant cannot have any benefit from the slight proof in support of a license in fact to enter upon the premises, as no justification of that character is set up in the answer. (*Haight* v. *Badgeley and wife*, 15 *Barb.* 499.)

There was no proof introduced to sustain the justification, or new matter pleaded by the defendant.

This disposes of the whole case, with the exception of a single point presented by the assignment of error in fact, viz: that some of the jurors who sat upon the trial were not competent, as such, by reason of not having the property qualification prescribed by the statute. After issue was joined an adjournment took place, and the defendant, although present, did not appear on the trial. (*Fanning* v. *Trowbridge*, 5 *Hill*, 428.) It is claimed in his behalf, that as he did not appear, no objection which he might have taken, had he appeared, is waived, and that he may avail himself of any such objection on appeal.

The general doctrine, that when a party does not appear he waives nothing, is well settled; but this means, nothing impeaching the jurisdiction or authority of the court to act, and

nothing in the way of objection to the proceedings and the competency or sufficiency of evidence on the part of the plaintiff. This is the extent to which the rule has been or can properly be carried. In *McNutt* v. *Johnson*, (7 *John.* 18.) the objection was the incompetency of the proof, and the court say, "The defendant not being present at the trial cannot be deemed to have waived any objection to the competency of the proof; it ought therefore to have been legal." In *Northrup* v. *Jackson*, (13 *Wend.* 85,) it was objected "that the declaration was general when it should have stated the special contract, and also that parol evidence was given of the letter of the defendant upon which his liability rested." The court say, "as the defendant waived nothing on the trial he has a right now to raise the objections." In *Squier* v. *Gould*, (14 *Wend.* 159,) the objection allowed was, that evidence was received which was not admissible. In *Tiffany* v. *Gilbert*, (4 *Barb.* 320,) error in fact was assigned on certiorari, that the judgment was rendered by a justice of the peace not residing in the same town with either of the parties, nor in an adjoining town, &c. wherefore the justice had not jurisdiction. The judgment was reversed in the county court on that ground, and the decision was affirmed in this court. The objection in the case last cited did not appear in the plaintiff's proceedings or evidence, but as it went to the jurisdiction of the court, the plaintiff was allowed to make it by assigning error in fact. (*See Robinson* v. *West*, 11 *Barb.* 309.) In *Post* v. *Black*, (5 *Denio*, 66, 67,) the return of the justice showed he was related to the plaintiff, and it was objected on the return only, without any assignment of error in fact, that the justice was thereby disqualified from acting as such, and the court, after remarking that the omission to notice the objection at the trial was not a waiver of it, say, "The question of jurisdiction may be raised at any time."

In cases of defect of jurisdiction, the proceedings are generally a nullity, and may be attacked for that cause collaterally, and there is therefore much propriety in permitting a party who did not appear in the court below, to have the benefit in

error of such a defect by assigning error in fact; but with the exception of objections of that character, and those which arise upon the proceedings and case of the plaintiff, I think all objections are waived by an omission to appear and make them in the proper form, before judgment. The right to answer, and hence of necessity the right to make a defense which must be set up by answer in order to be available, is waived by not appearing in the court below. Payment, release, set-off, accord and satisfaction, and all affirmative defenses, or defenses arising out of new matter to be brought forward by the defendant, which existed before judgment, are thus waived. No one would think of making such matters the subject of an assignment of error in fact. The same principle which excludes this, applies, in my judgment, with the exceptions already stated, to all objections in the nature of a pleading founded upon new matter. And to this class belongs a challenge to a juror for a want of the requisite property qualification, or for any thing else forming a principal cause of challenge. Such a challenge is in the nature of a pleading, although not strictly a pleading as regulated by the code; it must be answered by a denial or a demurrer, and an issue thus be formed upon it, which must be formally tried; the issue makes a part of the record, and the proceedings and decision upon it may be reviewed on appeal. (*Ex parte Vermilyea*, 6 *Cowen*, 555. *The People* v. *Vermilyea*, 7 *Cowen*, 108. *The People* v. *Mather*, 4 *Wend.* 229.) A challenge to a juror does not go to the jurisdiction of the tribunal; though a juror be incompetent as such the trial is not invalidated; and the only mode by which the incompetency can be alleged and the facts constituting it introduced is by a challenge which must be supported by proof, if the facts are disputed. Where there is no challenge there is no issue and no basis for the proof. And the challenge must be made before the trial, otherwise the right to make it is waived.

On the whole, I am satisfied, that an omission to challenge is a waiver of all objection to a juror, in like manner as an

omission to plead a defence is a waiver of the defense. Wheth er there be an appearance or not makes no difference.

The judgment of the county court must be reversed, and that of the justice affirmed.

[Cayuga General Term, June 4, 1855. *Selden, T. R. Strong* and *Johnson*, Justices.]

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## Curtiss *vs.* The Rochester and Syracuse Rail Road Company.

In an action against a rail road company, to recover damages for an injury sustained by a passenger by means of a collision, it is not erroneous for the court to charge the jury that, in ascertaining the amount of the plaintiff's damages, it is proper for them to consider the bodily pain and suffering which has occurred, or is likely to occur, in consequence of the injury, but that they cannot act upon conjecture as to the prospective condition or situation of the plaintiff; and that the jury can only consider, in respect to the future, what the evidence renders reasonably certain will necessarily and inevitably result from the original injury.

Bodily pain and suffering which is necessarily and directly to flow from the injury, is as much a part of the injury as the continuance of a physical disability occasioned by it.

Only one action can be maintained to recover damages for a personal injury. Yet it is not necessary for the injured person to wait until all the consequences of the injury have become fully developed. He is entitled to sue whenever he thinks proper, and to recover damages for both past and future pain of body, as well as for past and future deprivation of health, or of any of his bodily powers.

But in respect to all the subjects of damage, it is requisite that they should be the legal, direct and necessary results of the injury, and that those which, at the time of the trial, are prospective, should not be conjectural.

Damages arising from bodily pain and suffering need not be alleged specially in the complaint.

Where it appeared, from the evidence, that the cars were thrown off the track of a rail road, and a collision thereby occasioned, because the rails were not right, or from some defect in the mode of securing them in their place; *Held* that the degree of care which the law imposed on the rail road company required them to see that the rails were in a right position, and not to trust exclusively to the lever of the switch, when the rails were in open view while moving it; and also to see that the rails were firmly secured; and that if they omitted to do so they were guilty of negligence.

It was therefore *held*, further, that the question of negligence was properly submitted to the jury.

Also *held*, that proof, uncontradicted, that the switch was rightly placed, did not rebut all presumption of negligence.

Where, in an action against a rail road company to recover damages for a personal injury occasioned by a collision, there was evidence showing that the plaintiff had been incapacitated by the injury from labor most of the time for nearly two years, and there was also testimony tending to prove that the disability would be permanent, or at least long continued; *Held*, that a verdict of $4,500 was not so excessive as to indicate partiality, prejudice, passion, or any thing improper, in the jury.

THIS was an action to recover damages for an injury received by the plaintiff while a passenger in the car of the defendants, in consequence of the defendants' negligence. The complaint alleged that the defendants were common carriers, for hire and reward, of persons and their baggage, between Syracuse and Rochester. That on the 7th day of August, 1852, the plaintiff became a passenger in the defendants' car at Geneva, to be carried safely to Auburn; and that while on the way the defendants so carelessly and negligently conducted themselves, their railroad, and the cars in which the plaintiff was sitting, that the engine and cars ran off the track at Waterloo, and produced a collision between the different cars of the same train; and that by reason of that collision and the negligence of the defendants, she received an injury on one of her legs. The complaint also set forth and claimed special damages—in all, $12,000. The answer was a denial of each and every allegation of the complaint, except that which alleged that the defendants were a body corporate, and that they owned the said rail road and used it for the conveyance of passengers from Syracuse to Rochester. The action was tried at the Cayuga circuit, in May, 1854, before Justice Johnson. The plaintiff proved the facts set forth in the complaint, and introduced medical and other testimony to show the nature and extent of the injury sustained by her. The collision occurred at Waterloo, where there were three tracks—a middle one, and one on each side, and while the train in which the plaintiff was a passenger was running at the usual speed, upon the middle track. The

train ran off on to a side track, and thence into the ditch.

The court charged the jury that the fact of this accident occurring, was of itself presumptive evidence of negligence on the part of the defendants, and it lay with them to explain and to prove that they were not negligent, in order to discharge them from liability for the injury occurring to the plaintiff; that it was a question of fact for the jury to determine from all the circumstances and evidence of the case, whether the switch was rightly placed, and whether the injury arose from any negligence on the part of the defendants; that if the injury was the result of pure accident only, and without any neglect of the defendants, the plaintiff could not recover; and that it was a question of fact, for the jury to determine from the evidence, whether the injury arose from any neglect of the defendants; and if so, then the defendants were liable. To which charge the defendants excepted. The court further charged the jury that this was not a case for exemplary damages; but that it was for the jury to determine, from the evidence, the amount of damages which the plaintiff had sustained or was likely to sustain in consequence of the neglect of the defendants; and that in ascertaining such damages, they would be justified in taking into consideration, and it would be proper for them so to consider, the bodily pain and suffering which the plaintiff suffered or was likely to suffer in consequence of the neglect of the defendants; and also, for the loss of her time and the physicians' bills and such expenses and injuries as the plaintiff had sustained in consequence of the neglect of the defendants, and to award to the plaintiff such damages therefor as in their judgment would be proper. To which charge, so far as it related to bodily pain and suffering, the defendants excepted. The defendants requested the court to lay down some more definite rule to the jury for estimating damages in cases of injuries of this kind. But the court declined so to do; and the defendants excepted to such refusal. But the court did charge that future or prospective damages could not be awarded by the jury upon conjecture as to the probable condition or situation of the plaintiff, resulting from the injury; and that future damages

could only be awarded when it is rendered reasonably certain from the evidence, that such damages will inevitably and necessarily result from the original injury. The court further charged, that the presumption of negligence may always be repelled by proof that due and proper care had been taken by the defendants, and if the jury were satisfied that the accident occurred in consequence of some secret defect in the materials, which could not be discovered by human foresight, then the injury was the result of a mishap for which the defendants were not to blame and could not be legally amerced in damages, and the verdict must be for the defendants. The counsel for the defendants then asked the court to charge the jury that they could not take into consideration, in estimating the plaintiff's damages, the bodily and mental pain and suffering which the plaintiff underwent, resulting from the injury; and that the only compensation which the jury could award to the plaintiff was for the pecuniary loss which she had sustained; which request the court declined, and the defendants excepted. The defendants then requested the court to charge that the proof, uncontradicted, in this case showed that the switch was rightly placed for the train in which the plaintiff was a passenger, and awaiting its approach; and that this rebutted any presumption of negligence arising from the accident; and that the plaintiff could not recover without proof of actual negligence. The court declined thus to charge, and the defendants excepted. The jury found a verdict for the plaintiff for $4,500, and the plaintiffs, upon a case, moved for a new trial.

*Geo. Rathbun*, for the plaintiff. There is in this case no objection or exception for the admission or rejection of evidence. The only points taken or raised on the part of the defendants, are on the charge of the court to the jury. I. The charge of the court, at fol. 87 and 88, is correct, to wit: "The fact of this accident occurring, was of itself presumptive evidence of negligence on the part of the defendants, and it lay with them to explain it, and to prove that they were not negligent, in order to discharge them from liability for the injury occurring to the

plaintiff." The counsel for the defendants will hardly attempt a denial of the first proposition in this part of the charge. The legal presumption is too well established. This being conceded, as it must be, the second is an unavoidable and necessary consequence. It is a conclusion of law, arising from a legal presumption. Presumptive evidence of negligence is *prima facie* evidence, which, unexplained or uncontradicted, entitles the plaintiff to a recovery. Hence, to avoid the force of this presumption, the defendant must disprove or explain it.

II. This part of the charge contains two distinct propositions; one is undoubtedly correct; if the other be, in fact, incorrect, the defendants cannot take advantage of it, because their exception is to the two propositions combined. It is too broad. An exception or objection must be specific. It must be limited to matter claimed to be erroneous, and must be, in fact, erroneous, not in part, but entire. A general objection to a charge, or part of a charge, must stand or fall upon the question, Is the part so objected to, in the whole erroneous?

III. The rule laid down by the court to guide the jury in the ascertainment of the plaintiff's damages is not erroneous. This part of the charge contains several propositions, various in character, and presenting the various items, proper to be taken into consideration by the jury in determining the amount of damages. It cannot be denied that most of these items are correct. It may now be contended that the bodily pain and suffering "which the plaintiff was likely to suffer in consequence of the neglect of the defendants," as stated in the part of the charge excepted to, was erroneous. This we deny. But we claim that the defendants are not at liberty to raise that question. No such point is made in the case. If the counsel had placed his exception on this precise ground, it is possible the court might have modified its charge in this respect. At all events, the attention of the court would have been called directly to the question, and a decision made, with the knowledge that the counsel regarded it as erroneous. The exception taken, points equally to any and all other portions of the charge to which exception is taken. This exception is too broad. Nothing was said about the damages

alleged in the complaint; no exception was placed on any such ground. It is too late to do so in this court.

IV. The damages found by the verdict of the jury are not excessive.

V. The court was correct in declining to charge as requested by the defendants' counsel.

*Geo. Underwood*, for the defendants. I. The learned judge erred in charging the jury, "that in ascertaining the plaintiff's damages they would be justified in taking into consideration, and it would be proper for them so to consider, the bodily pain and suffering which the plaintiff suffered, *or was likely to suffer*, in consequence of the neglect of the defendants." We are aware that this court in the case of *Morse* v. *The Aub. and Syr. R. R. Co.*, (10 *Barb.* 621,) have held that a jury could give damages for pain and suffering in an action of this kind. Without questioning here the correctness of that decision, we place our objections to the charge of the court in this case upon strictly legal principles. (1.) The charge permits and invites the jury to conjecture or attempt an estimate of the extent, duration and intensity of *future pain* and suffering. This goes much farther than the case cited. Such damages would be analogous to the allowance of unearned and contingent profits, which is never permitted (*Blanchard* v. *Ely*, 21 *Wend.* 342. *Giles* v. *O' Toole*, 4 *Barb.* 261). The same rule prevails in actions of tort as on contract. (21 *Wend.* 350. 3 *Wheat.* 546. 1 *How.* 28.) (2.) It allowed the jury to go out of the evidence. There was no proof of any future pain, or that there would be any. The age of the plaintiff was not shown, so that the jury might have even that for a starting point in their conjectures of the probable duration of her life, and consequent duration of suffering. (3.) There was no claim for any such special damage in the complaint, and allowance for damages therefor would be giving more than she claimed. The complaint only claims that she suffered pain from the time of the injury to the commencement of the action. It is silent in respect to future pain and suffering. The plaintiff cannot recover any other special damages than those alleged. (3 *Am.*

*Jurist*, 294. 3 *Bing. N. C.* 371. 4 *Blackf.* 277, 8. 2 *Phil Ev.* 248. 4 *Barn. & Adol.* 514.) The law presumes that the plaintiff knows what her damages are, and that she will not fail to allege enough. "And therefore, for the jury to give more damages than the plaintiff declares for, would be unreasonable." (*Lilly's Prac. Rep.* 2*d ed.* 1. 1 *Archb. N. P.* 414.) If damages for future loss be claimed, the complaint should have counted upon and averred the same, as was done in the case of *Collett* v. *The London and Northwestern Railway Co.*, (6 *Eng. Law and Eq. Rep.* 307.) And the jury having been thus instructed upon a question of this kind, where their sympathies would naturally and generously run in favor of the plaintiff against a rail road corporation, it is impossible to say what proportion of the verdict was occasioned by their calculations upon this point. (*Graham on New Tr.* 260 *to* 265.) (4.) Such damages must be, in the nature of man's existence and constitution, wholly and absolutely contingent and conjectural; dependent upon life, health, disease, conditions, circumstances and providences, which we humbly insist are not within the province of a jury, sworn to *give a true verdict*, according to the *evidence* upon the issues, and no other, joined between the parties. (5.) The complaint does not aver any pain or suffering *in consequence* of the defendants' neglect.

II. The learned judge also erred in declining to charge the jury, as requested by the counsel of the defendants, that the proof showed that the switch was rightly placed; that this rebutted any presumption of negligence; and that the plaintiff could not recover without proof of actual negligence. And the court also erred in charging the jury as it did, that it was a question of fact, for the jury to determine, from the evidence, whether the injury arose from any neglect of the defendants; and if so, then the defendants were liable. The evidence, uncontradicted, shows that the switch was rightly placed. The lever and target were rightly placed for the express train, and the evidence shows that it had always theretofore worked well, and did, that morning. Only a few minutes before the accident the freight train was, at this place, switched off for the purpose

of allowing this express train to pass down. The switch was changed for this purpose, and, after the freight train had passed off the main track to the side track, it was immediately changed or put back to the main track in order to pass this express train then expected. This shows that the defendants used due and proper care at that point. It is true, Halligan says he did not look to see whether the rails moved when he put back the lever and target in an upright position, which would, if the rails had moved, have been correct for the main track and for this express train, nor did Connolly see the track itself after the lever and target were put back in an upright position. Halligan had, while then standing there, just moved the lever and target from an upright position (on the main track) to allow the freight train to pass off, which it did by reason of his moving the lever, and then as soon as the train passed on to the side track, immediately changed back the lever and target to an upright position, *and locked it up*, which made it correct for the main track and the express train. Connolly saw all this done by Halligan. Having done that, which had been uniformly and usually done to allow similar trains of cars to pass that point in safety, (for the train was going at its usual speed,) it is humbly submitted that "due and proper care" was exercised by the defendants. They had done all that very careful men do in such cases. They trusted to the law of mechanics. The lever was constructed upon mechanical principles, and had been uniformly obedient to the law of those principles. It had theretofore performed its office. Human care and foresight cannot change the action of those principles. The law which controls the action of a lever is uniform and not subject to any exceptions. If the defendants had neglected to take any steps to change the lever or target to its correct position for this train, or had left the same unattended for any length of time, or not fastened, it might be regarded, possibly, as negligence on the part of the defendants. But neither of those circumstances exist in this case. Human care and foresight are to be used in a relative sense. Every accident furnishes some new experience even to the most prudent men, and they are thereby

instructed how it might have been possibly avoided. And in such cases, the inquiry should be, have the defendants taken and exercised that care and foresight which very careful men exercise in similar circumstances, and not whether human care and foresight could not have avoided the accident, for that would be to require of men a care and foresight which should prevent every accident except that by the act of God. The rule as laid down that every accident to a passenger while in the care of the carrier is presumptive evidence of negligence so as to shift the burden of proof upon the defendants, though in opposition to the rules of evidence in some other cases, may be well enough; but to add that the defendants can only discharge themselves by showing that they have done all which human care and foresight (made to be regarded equivalent to aftersight) could possibly have done to guard against the accident, is neither just nor equitable. For not an accident has happened (except by the act of God,) that intelligent and scientific men, by a careful consideration of all the circumstances attending the case, could not tell how it might probably or possibly have been avoided. The true rule in this case, we submit, was that which the learned judge was requested to lay down by the defendants' counsel. The plaintiff showed that she was injured. That made out a presumptive case in her favor and cast the burden of proof upon the defendants to show that they had not been negligent, but had used due and proper care (such was the issue,) to have the plaintiff safely conveyed. The defendants showed affirmatively, by witnesses uncontradicted, that the defendants were not negligent, but had used and relied upon the due working of a switch which, only a moment before the accident, had performed its office well and which was proved to have always worked well for that purpose, and to have been rightly placed and carefully locked up for the passing of the express train. The facts and circumstances thus proved by the defendants rebutted and overcame the presumptive evidence which the law makes for the plaintiff by her showing merely an accident; and without any further *proof* or evidence of negligence on the part of the defendants, the

plaintiff ought not to be entitled to any judgment. Proof overcomes presumptive evidence in all other cases, and in a case of this character it would seem that the proof, which the defendant gave, ought at least to have balanced the presumption which the law indulges in favor of the plaintiff.

III. The injury proved did not warrant the heavy verdict rendered; and, for this reason, the defendants should have a new trial. The plaintiff alleges that one of her limbs is incurably injured. It appears that this alleged injury consists of a superficial or a cutaneous eruption upon one of her limbs. It is the uniform testimony of all the physicians examined, that the bone is not diseased nor the periosteum. And it is the concurrent testimony of all the same medical men that the injury will not prove permanent, and that the plaintiff will recover from it. The neuralgia and pains were occasioned, not by the alleged injury, but by a derangement of the liver and kidneys, and came on some time after the accident. This liver affection could not be occasioned by this injury, but would be by a cold. As to the origin of this cutaneous affection none of the witnesses speak positively, but all concur that her general health, affected by other causes than this injury, has prevented its speedy cure.

*By the Court*, T. R. STRONG, J. The fair construction of the whole charge in relation to bodily pain and suffering of the plaintiff, is, that in ascertaining the amount of her damages, it would be proper for the jury to consider the bodily pain and suffering which had occurred, or was likely to occur, in consequence of the injury, but that they could not act upon conjecture as to the prospective condition or situation of the plaintiff; they could only regard in respect to the future what the evidence rendered reasonably certain would necessarily and inevibly result from the original injury. Thus understanding the charge, I think the instruction as to the propriety of taking into consideration future bodily pain and suffering, on the question of damages, was wholly unobjectionable. Such a consequence, which was necessarily and directly to flow from the injury,

was as much a part of it as the continuance of a physical disability which the injury occasioned. It was certainly proper for the jury, in estimating the damages to the plaintiff, to regard the effect of the injury in future upon her health, the use of her limbs, her ability to labor and attend to her affairs, and generally to pursue the course of life she otherwise might have done; and I do not perceive why it was not equally proper for them to consider its effects in producing bodily pain and suffering. But one action could be maintained by the plaintiff for her damages; it was not necessary for her to wait until all the consequences of the injury had become fully developed; but she was entitled to sue whenever she thought proper, and to recover damages for both past and future pain of body, as well as for past and future deprivation of health, or of any of her bodily powers. In respect to all the subjects of damage, it was requisite that they should be the legal, direct and necessary results of the injury, and that those which at the time of the trial were prospective, should not be conjectural. It was also requisite that they should be supported by such clear and certain evidence as ought to produce conviction in fair minds. All such results, in the aggregate, constituted the injury.

There is nothing speculative or contingent, in a legal view, in regard to such damages. They are wholly unlike the loss of uncertain profits by the breaking up of a bargain, or the derangement of one's business, resulting from an injury.

It was not necessary for the plaintiff to allege the damages under consideration specially in her complaint. They were general damages, implied by law, as much as a continued disability consequent upon a broken limb. The amount was to be controlled by the evidence disclosing the circumstances of the case, as similar damages must be in all such cases. The degree of bodily pain and suffering, as of a bodily disability, of course varies in different cases.

It cannot be said there was no evidence to support this item of the plaintiff's claim. The injury took place in August, 1852; the action was tried in May, 1854; the condition of the plaintiff during the interval was fully proved; and medical testimony

was given in respect to the future consequences of the injury. It is true the age of the plaintiff was not proved, and therefore the evidence was less certain than it would otherwise have been, but I do not think that proof of her age was indispensable to the allowance of some damages of this character.

The question of negligence was properly submitted to the jury. Although there was evidence which was uncontradicted, that the lever and target were rightly placed to bring the switch into a proper position, and that the switch had always before, and but a short time previous to the injury on the same day, worked well, yet no witness was able to testify that he noticed the rails, and that they were right, when the cars came along; and the fact stands out prominently upon the evidence, that the cars were thrown off because the rails were not right, or from some defect in securing them in their place. The degree of care which the law imposes on the defendants required them to see that the rails were in a right position, and not to trust exclusively to the lever, when the rails were in open view while moving it; and also to see that the rails were firmly secured; and if they omitted to do so they were guilty of negligence. I am clearly of opinion that it would have been error to withdraw this question from the jury.

For the same reason, the refusal to charge, that upon the uncontradicted proof the switch was rightly placed, and that that rebutted any presumption of negligence, was correct.

In regard to the amount of damages awarded by the jury, there was evidence showing that the plaintiff had been most of the time thus far since the injury, incapacitated by it from labor; and there was also evidence tending to prove that the disability would be permanent, or at least long continued. I cannot say in view of this evidence, that the sum is too great, much less that the damages are so excessive as to indicate partiality, prejudice, passion, or any thing improper, in the jury.

The motion for a new trial must be denied.

[Cayuga General Term, June 4, 1855 *Selden, Johnson* and *T. R. Strong*, Justices.]

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## BOYCE *vs.* THE BOARD OF SUPERVISORS OF CAYUGA COUNTY

Even in cases where no discretion is vested in a board of supervisors, in relation to an account presented to them, and a clear legal duty rests upon them, to cause the whole amount of the account to be levied, collected and paid, as a county charge, which they refuse to perform, an *action* will not lie, against the supervisors. The only remedy of the creditor is by an application to the court for a *mandamus*, to compel them to perform that duty.

To warrant a suit against a board of supervisors, as representing the county, there must be some duty of the county, and the case must be such that an action, founded upon that duty, is the appropriate remedy.

Where the duty relied upon is a duty, not of the county, but of the board of supervisors, no action will lie.

THIS was an action by the plaintiff to recover compensation for his services as a physician, in the year 1853. The complaint alleged that on or about the 1st of April, 1853, a board of health was duly appointed and organized in and for the city of Auburn, pursuant to chapter 324 of the laws of 1850; that during the summer and fall of 1853, the small pox was prevalent in the city, and the plaintiff, being a physician, was employed and directed by the said board of health to attend upon the sick and give them the necessary medical advice and attendance; that the plaintiff did so, and that his services were worth the sum of $168.75. That the plaintiff afterwards, and on or about the 28th of Nov. 1853, presented to the defendants, at their annual session held at Auburn, his bill for such services, made out in items, amounting to the said sum of $168.75 duly verified, and duly certified by the said board of health to be correct, which thereby became, and was, a proper charge against the county of Cayuga. That the defendants had no discretion as to the allowance of the plaintiff's account and were precluded from exercising any discretion thereon by the certificate of the said board of health, but that the amount of said account was made a charge against the county of Cayuga, by the said certificate of the board of health, and that the said account became thereby a debt against the county. And the plaintiff insisted that the defendants were bound, at their said annual meeting, to levy, collect and pay the said ac-

count, in the same manner as other county charges are levied, collected and paid; but the complaint alleged that they neglected and refused so to do; wherefore the plaintiff demanded judgment against them, for the amount of his account. The answer admitted the material facts set forth in the complaint, but alleged that the plaintiff's account contained many items which the board of health had no right to allow, and insisted that they, the defendants, were not bound to levy, collect and pay the said account. On the trial, the plaintiff proved his employment by the board of health, and the performance of the services charged for; also that the account had been presented to the board of health, who made the following certificate, at the foot thereof: "We certify that the above bill is correct and rendered by the said Boyce for the board of health of the city of Auburn, being employed by them." (Signed by the board.) The plaintiff further proved that the account, with the said certificate appended, had been presented to the board of supervisors, who refused to audit and allow the same. With the consent of the counsel for both parties, the court directed a verdict in favor of the plaintiff for the sum of $179.14, subject to the opinion of the court at a general term, on a case.

*Geo. O. Rathbun*, for the plaintiff.

*D. H. Marsh*, for the defendants.

*By the Court*, T. R. Strong, J. Assuming, without deciding, that no discretion is vested in the board of supervisors in relation to the account of the plaintiff, and that a clear legal duty rests upon them to cause to be levied, collected and paid, the whole amount of the account as a county charge, which they refuse to perform, I am satisfied that the law does not allow to the plaintiff a remedy by action; and that his only remedy is by an application to the court, for a mandamus, to compel the supervisors to perform that duty. The board of supervisors are not a corporation; and as such a board, and apart from the

county, are not liable to a suit; they can only be sued as representing the county, under the statute which prescribes that in suits against a county the county shall be sued "in the name of the board of supervisors thereof." To warrant a suit against them as representing the county, there must be some duty of the county, and the case must be such that an action founded upon that duty is the appropriate remedy. When they are made defendants in form in such a case, the county are the real defendants. The difficulty in maintaining an action in the present case is, that the duty upon which it must rest is a duty, not of the county, but of the board of supervisors. The statute (*Laws of* 1850, *p.* 692, § 7) makes the expenses therein mentioned a county charge, and directs that they "shall be levied, collected and paid, under the direction of the said board of supervisors of the respective counties, in the same manner as other county charges are levied, collected and paid." The cause of action is the neglect or refusal of the supervisors to perform this duty. By the revised statutes (*Vol.* 1, *p.* 364) each county has limited corporate powers, and among others power "to sue and be sued, in the manner prescribed by law;" but there does not appear to be any good reason why it should be subjected to a suit for this failure of duty by the supervisors, and there is no provision of statute imposing upon it that liability. If an action should be permitted, no execution could be issued on the judgment. (2 *R. S.* 475, § 107.) And some further remedy would be necessary if the supervisors should refuse to provide for its payment. (*Id.* 474, § 102 *to* 104.) The remedy by mandamus, operating upon the supervisors as officers of the county, is a full, efficient, and, as I think, the only remedy of the plaintiff.

In *The People* v. *The Supervisors of Columbia*, (10 *Wend.* 363,) it was held that a mandamus against the supervisors was the proper remedy when a duty rested upon those officers to cause to be levied, and collected, a certain sum, made a county charge, in like manner as other charges upon the county were required to be levied and collected; and that an action against the county would not lie. Chief Justice Savage, in delivering

the opinion of the court, says, "If an action lies in this case, then a mandamus should be refused. I think an action will not lie. This statute directs the supervisors to levy and collect the amount of the deficiency; it is a duty imposed upon those officers, which should be performed by them, but for their neglect the county in its corporate capacity should not be punished; nor does any liability attach to the county to pay the money in any way other than that pointed out in the statute." (*See Brady* v. *The Supervisors of New York*, 2 *Sandf. S. C. R.* 460.)

The principle that a mandamus is the proper remedy in such cases, is recognized and applied in numerous authorities. (*Bright* v. *Supervisors of Chenango*, 18 *John.* 242. *Johnston* v. *Supervisors of Herkimer*, 19 *id.* 272. *The People* v. *Supervisors of Cayuga*, 2 *Cowen*, 530. *The People* v. *Supervisors of St. Lawrence*, 5 *id.*292. *The People* v. *Supervisors of Dutchess*, 9 *Wend.* 508. *The People* v. *Supervisors of Ulster*, 3 *Barb. S. C. R.* 332. *The People* v. *Edmonds*, 15 *id.* 540.) All these and other similar authorities impliedly hold, that an action will not lie; as the principle is clear and undisputed that a mandamus will not be issued when there is an adequate remedy by action.

In *The People* v. *The Supervisors of Fulton*, (14 *Barb.* 52,) the doctrine is advanced, although it was not necessary to the decision of the case, in the view taken by the court of another point, that if the board of supervisors "has neglected or refused to perform a legal duty enjoined upon them, and which they were bound to discharge, an action will lie against them;" and therefore a mandamus cannot be granted. These cases are referred to in support of the doctrine: *Ex parte Lynch*, (2 *Hill*, 45.) *The People* v. *The Mayor of New York*, (25 *Wend.* 680.) *Ex parte The Fireman's Ins. Co.*, (6 *Hill*, 243.) In the first case a mandamus against officers acting as supervisors of New York was refused, on the ground that the relator had an ample remedy by action against *The Corporation of New York;* inasmuch as the statute allowed him a certain sum as his salary, to be paid by the common council of the city, out of the city treasury. The next case is of a like character. And

in the remaining case a mandamus against the Commercial Bank of Albany, a private corporation, was refused because there was an adequate remedy by action. None of these authorities support the doctrine that an action will lie against a board of supervisors, or a county, in cases like the present; and I do not find any adjudication sustaining it. (*See Brady* v. *The Supervisors of New York*, 2 *Sandf.* 474.)

There must be judgment in favor of the defendants.

[Cayuga General Term, June 4, 1855. *Selden*, *Johnson* and *T. R. Strong*, Justices.]

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## The Glen Cove Mutual Insurance Company *vs.* William Harrold, jun. and William Harrold.

Rights of action which had accrued previous to the time when the code was enacted, and which then existed, are expressly excluded (by sec. 66) from the operation of the section which requires that a new promise, in order to take a case out of the statute of limitations, shall be in writing.

A contract to guaranty the payment of a promissory note, although made simultaneously with the note, and written upon the same paper, and upon a consideration advanced on the credit of the guarantor, conformably to a previous understanding, must *express* the consideration upon which it is made, or it will be void.

THE nature of this action, and the material facts, are stated in the opinion of the court. This was a motion for judgment, after a trial at the circuit.

*W. S. McCoun*, for the plaintiff.

*E. J. Beach*, for the defendant Wm. Harrold.

S. B. Strong, J. This action is to recover from the defendants the unpaid balance of the principal sums of money specified in three promissory notes made by William Harrold, jun. and the payment whereof was guarantied by his father William

Harrold, the said two defendants, with interest on each note at the rate of six per cent per annum from the 1st day of April, 1848. The notes with the guaranties thereon are in the words and figures following:

"$100. On demand I promise to pay Elwood Valentine, treasurer of the Glen Cove Mutual Insurance Company, or his successors in office, one hundred dollars, with interest at six per cent per annum, for value received.

Glen Cove, May 13, 1843. WILLIAM HARROLD, jun."

(Indorsed) "I guaranty the payment of the within note.

WILLIAM HARROLD."

Interest paid yearly up to the 1st of April, 1848, and $10 of the principal paid 4th January, 1849. The payments being indorsed on the note.

"$450. On demand I promise to pay Elwood Valentine, treasurer of the Glen Cove Mutual Insurance Company, or his successor in office, four hundred and fifty dollars, with six per cent interest from date, for value received.

Glen Cove, Sept. 22, 1843. WILLIAM HARROLD, jun."

(Indorsed) "I guaranty the payment of the within note.

WILLIAM HARROLD."

Payments indorsed of interest annually up to 1st April, 1848 and of $40 on account of the principal, 4th January, 1849.

"$200. On demand I promise to pay Elwood Valentine, treasurer of the Glen Cove Mutual Insurance Company, or his successor in office, the sum of two hundred dollars, with interest from date at six per cent per annum, for value received.

Glen Cove, Feb. 13, 1846. WILLIAM HARROLD, jun."

(Indorsed) "I guaranty the payment of the within note.

WILLIAM HARROLD."

Payments indorsed of interest annually up to 1st April, 1848, and of $20 on account of the principal, 4th January, 1849.

The notes were given for moneys loaned at their respective dates, by the plaintiffs, to William Harrold, jun. One of the terms of the loans in each case was that the payment of each note was to be guarantied by William Harrold. This was com-

municated to William Harrold when he signed the guaranty on each note. The money in each case was paid to William Harrold, jun. on his delivering the note with the guaranty indorsed upon it, and signed by Wiliam Harrold, and principally upon the credit of the guarantor. The payments indorsed were made by William Harrold, jun. without the participation of William Harrold. In the year 1849, William Harrold promised verbally to pay the three notes in a given time, which expired before the commencement of this action, and said that he wanted to have time to turn himself. He also said that his son William would ruin him, and that he would have to sell his property.

William Harrold (the father) alone answered the complaint. He admits the signing of the notes by the maker, and of the guaranties by himself. One point upon which he insists is that the right of action, if any ever existed against him, was barred by the statute of limitations. This objection was fully raised and taken in his answer. The revised statutes and the code both provide that actions upon contracts not under seal must be brought within six years after the cause of action shall have accrued. Under the revised statutes the cause of action might be continued or revived by a mere verbal promise such as was made in this case. The code, however, provides that such promise, to be valid, in cases coming under its operation, must be in writing. That however is inapplicable to the case under consideration, as it is expressly declared (original § 66) that the *title* in which it is included shall not extend to cases where the right of action had then accrued. In this instance the right of action, if any, had accrued and existed at the time when the code was enacted. I am satisfied, notwithstanding what was said in *Wadsworth* v. *Thomas*, (3 *Code Rep.* 227,) that a case like the present is expressly excluded from the operation of the section requiring that the new promise, to be valid, must be in writing.

The more material question however is, whether William Harrold, the guarantor, was ever legally bound for the payment of these notes. The objection to his liability is that no consideration is expressed in either guaranty. I must confess that an-

tecedently to a late decision in the court of appeals my opinion was that if the principal contract and the guaranty are both on the same piece of paper and were written at the same time, they should be considered as one transaction, and the signature of the guarantor should be deemed a subscription by him not only to the guaranty, but also to the acknowledgment of the consid eration in effect expressed by the principal contract, and that both, taken together, should be considered as a compliance with the statute. I so expressed myself in the court of appeals in the case of *Brown* v. *Curtis*, (2 *Comst.* 233,) and as I then supposed, and still think, the opinion was sustained by five of the other then judges of that court. It is true I intimated an impression that this might have in effect rather overstrained what is actually done by the guarantor in order to meet the equities of particular cases; but I added that, (as I then thought) the rule had been settled in the court for the correction of errors. Judge Jewett, in the case of *Durham* v. *Manrow*, (2 *Comst.* 550,) says that there are many cases to show that a guaranty made at the same time with the principal contract, and constituting an essential ground of the credit given to the principal debtor, requires no other consideration than that which upholds the principal contract; and that it had also been held that in such cases the consideration need not be expressed in the written guaranty, but may be shown by parol evidence. True, he did not concur in the propriety of the rule, but I cite his authority to show his assent to what I have stated was the effect of previous decisions. However all these decisions (including those made by our court of dernier resort) were overruled by the court of appeals in the case of *Brewster* v. *Silence*, decided in April, 1853.(*a*) There, as in this case, the note and guaranty were signed simultaneously, and the consideration was advanced upon the credit of the guarantor, conformably to a previous understanding. But it was decided that the guaranty was void. That is the latest decision, and I must submit to its authority.

There must be judgment against the defendant William Har-

(*a*) 4 *Selden*, 207.

rold, jun. for the amount due on the three notes, and the costs against him, and in favor of William Harrold, (the father,) to be entered as of the day of the trial.

[Westchester Special Term, June 5, 1855. S. *B. Strong*, Justice.]

20 302
25 216
25 235
25 262
16h 222
27a 386

## The People *ex rel.* Munson I. Lockwood *vs.* William W. Scrugham.

Where an office is already filled, by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person; the proper remedy of the applicant being a *quo warranto*, or the action substituted in its place by the code.

But where the relator had been, for several years before, and was at the time when the commission to the defendant was issued, the actual occupant, claiming under color of right to hold the office, and never having at any time relinquished it; *Held* that if his claim was valid, neither the commission to the defendant nor the interference of the latter in the discharge of the duties, would constitute an actual expulsion from the office, inasmuch as the possession would follow the right; and that it was not a case of expulsion, but of interference by the defendant with the functions of an office actually held by another.

In such a case the incumbent should not be required to elect to consider himself out of possession of the office, and then be obliged to resort to a tedious action to procure his restoration.

The relator was duly elected a brigadier general, by the field officers of his brigade, in 1841. He held the office, and was in the discharge of its duties, when the act of May 13, 1846, was passed. Under that act a brigade was formed, consisting of the militia of his previous command, with a slight exception, with the addition of the militia of three other counties. The relator was, on the 9th of June, 1847, assigned to the command of the brigade thus constituted, (the 7th) pursuant to a provision contained in the 5th section, in the following words: "The brigadier general in commission and highest in rank residing in such brigade district shall be the commanding officer of such brigade." He held such command when the constitution of 1846 went into effect. By that instrument the provision for electing brigadier generals by the field officers of the brigade was continued. The 5th section of the 11th article is in these words: "The commissioned officers of the militia shall be commissioned by the governor, and no commissioned officer shall be removed from office, unless by the senate, on the recommendation of the governor,

stating the grounds on which such removal is recommended, or by the decision of a court martial, pursuant to law. *The present officers of the militia shall hold their commissions subject to removal as before provided.*" On the 5th of May, 1855, the governor issued a commission to the defendant, as brigadier general of the 7th brigade, and on the same day issued a general order, revoking so much of the order of June 9th, 1847, as assigned the command of the brigade to the relator, and directed the defendant to assume the command of the brigade. *Held* that the governor was not authorized, by the act of April 17, 1854, or any other statute, to displace the relator, or to appoint the defendant; and that both the commission to the defendant and the general order accompanying it were null and void.

A peremptory mandamus was accordingly awarded, requiring the defendant to permit the relator to exercise the office of brigadier general, without interruption or intrusion from or by the defendant.

DEMURRER to the return made to an alternative writ of mandamus.

*M. I. Lockwood*, in person, and *Ralph Lockwood*, for the relator.

*W. W. Scrugham*, in person, and *John Thompson*, for the defendant.

S. B. STRONG, J. This case is before me, upon an alternative mandamus, with several affidavits annexed to the writ, an answer, and a demurrer. The demurrer of course admits the facts and the direct denials contained in the answer, but not such assertions or denials as are merely inferential. The facts as they are represented in the pleadings are as follows:

The relator was in 1841, duly elected brigadier general of the 15th brigade, consisting of the militia of the county of Westchester. He shortly after his election received a commission from the governor, and thereupon entered upon the performance of the duties of the office, which he continued to discharge until the new organization of the militia, pursuant to the act of May 13th, 1846. Under that organization, the division, comprehending Westchester county, was divided into two brigades, one of which consisted of the militia of the county, with the exception of one town, and of the counties on Long

Island. The relator, being the brigadier general in commission and highest in rank residing in the brigade district including the greater part of Westchester county, thereupon became, according to the provisions of the act of 1846, (and whether they are valid or not will be considered hereafter,) the commanding officer of the brigade, and the command of such brigade was formally assigned to him in general orders. Under the act of May 13th, 1847, the counties on Long Island were detached from the brigade then under the command of the relator, and a district was formed, consisting of the militia of the counties of Westchester, Putnam and Rockland, which thereupon constituted and still continues to constitute the 7th brigade. The command of that brigade district was assigned by the commander-in-chief, in general orders dated the 9th of June, 1847, to the relator, he being the brigadier general residing in such district highest in rank who was in command on the 1st day of November, 1846, and who, (it is to be inferred, as there is no allegation to the contrary, and the legal presumption is in favor of the action of the highest military authority in our state,) had performed military duty according to the requirements of said last mentioned act. The relator thereupon assumed the command of the 7th brigade, as brigadier general, and continued to act in that capacity until he was interrupted by the defendant. On the 5th of May, 1855, the governor of the state issued a commission to the defendant as brigadier general of the said 7th brigade, and on the same day issued a general order revoking so much of the order of June 9th, 1847, as assigned the command of the brigade to the relator, and directed the defendant "to assume the command of said brigade." The defendant, on receiving his commission and the general order which accompanied it, took the requisite official oath, and commenced acting as commander of the brigade, and thereby interrupted the official action of the relator.

The alternative mandamus requires the defendant to permit the relator to exercise the office of brigadier general of the 7th brigade without any interruption or intrusion from or by the defendant, or to signify the cause why he will not do so. The defendant claims a right to the office under the

commission and general order to him, which he contends were fully warranted by the act of April 17th, 1854. He also objects to the relator's right to execute the duties of the actual commandant of the brigade at the time when the commission and orders of the 5th of June, 1855, were issued.

The counsel for the defendant contended, on the argument, that the solicited remedy by mandamus would be inappropriate under the circumstances stated by the relator, as, if his claim was well founded, he might and should have resorted to the action substituted by the code for the writ of *quo warranto*, (§ 432, *subd.* 1.) It is undoubtedly true, as was decided in the case of *The People* v. *The Corporation of the City of New York*, (3 *John. Cas.* 79,) that where an office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person. The proper remedy for the applicant was formerly by a *quo warranto*, and would be now by the substituted action. But an important question in the case under consideration is, which of the two competitors *actually fills* the disputed office. The relator had been for several years before, and was at the time when the commission to the defendant was issued, the actual occupant, and claimed then, and still claims, under color of right, to hold the office. He has never at any time relinquished it. If his claim is valid, neither the commission to the defendant, nor the accompanying order of the commander-in-chief, nor the subsequent interference by the defendant, would constitute an actual expulsion from the office. The possession would follow the right, as it uniformly does where acts of ownership are simultaneously exercised by contestants, and especially where the actual title is in the prior occupant. This, then, if the plaintiff's claim is well founded, is not a case of expulsion, but of interference by the defendant with the functions of an office actually held by another. In such a case, the incumbent should not be required to elect to consider himself out of possession of the office, and then to resort to a tedious action to procure his restoration. Besides, he could not institute the action without the assent and co-operation of the attorney

general, and that officer might so far doubt the justice of his claim, (and especially where it might be based upon the assertion of the assumption of unauthorized power by the executive, of whom he is the official adviser,) as to withhold his consent, and then the unlawfully ejected officer would be without a remedy, or if there should be any it would be very circuitous. It seems to me that the interests of the officer, and in a case like the present, of the public, require a more certain, adequate and speedy remedy. He should be promptly quieted in the discharge of his duties, and the many who are subjected to his command, in the performance of their military duty, should be informed without unnecessary delay to whom they owe obedience as their lawful superior officer. I think that if the relator is entitled to any relief it should be by mandamus. That mode of proceeding will not deprive the defendant of any right to which he would be entitled in an action in the nature of a *quo warranto* under the code. He may, in the one case, rely, as he might have relied in the other, upon his title, and if there had been any question of fact, it might have been submitted to a jury.

The main question in this controversy is, which of these gentlemen has the better title to the actual command of the existing 7th brigade of our state militia.

The relator was duly elected a brigadier general by the field officers of his brigade in 1841. He held the office, and was in the discharge of its duties, when the act of May 13th, 1846, was passed. Under that act a brigade was formed, consisting of the militia of his previous command, with a slight exception, with the addition of the militia of the three counties on Long Island. The relator was assigned to the command of the brigade thus constituted, pursuant to the provision contained in the 8th section of that act, which is in the following words: "The brigadier general in commission and highest in rank residing in such brigade district shall be the commanding officer of such brigade." He held such command when our present state constitution went into effect. By that instrument the provision for electing brigadier generals by the field officers of the brig-

ade was continued. The 5th section of the 11th article is in the following words: "The commissioned officers of the militia shall be commissioned by the governor, and no commissioned officer shall be removed from office unless by the senate, on the recommendation of the governor, stating the grounds on which such removal is recommended, or by the decision of a court martial, pursuant to law. *The present officers of the militia shall hold their commissions subject to removal as before provided.*" The next (6th) section provides that if the mode of election and appointment of militia officers directed by that constitution should not be found conducive to the improvement of the militia, the legislature might provide a new mode, "if two thirds of the members present in each house should concur therein." That the relator held the office of brigadier general when that constitution "came in force," and could be removed only pursuant to its provisions, there can be no doubt. He had not then been degraded from the office. The bounds of the brigade commanded by him had been greatly extended, and therefore it is true that it then comprehended many whose field officers had no voice in his election. But I am not aware that it has ever been decided that one holding an elective office shall be denuded of it by the enlargement of the district which elected him, and to which his official action was confined. The universal practice has been the other way. Additions have been made from time to time to the territories of the United States, of some of the states, of counties, and of towns, and in all cases the jurisdiction of the federal, state, county, and town authorities, has been extended in the newly acquired territory, although its inhabitants had no voice in their election. The constitutional provision prescribes the mode of their election, but not the limits of the territory over which their authority might extend. If the alteration of the military districts effected by the act of 1846 had ejected the officers in such districts, none of the field officers, and but few of the company officers, would have continued in office. That act did not contemplate so great and extensive a change, nor was it in fact made. The constitutional requisition was satisfied by the mode of their

election. There was no express confinement of their action or power to the limits of their original districts, nor was there any reason why they should be thus limited by implication. Had the act of 1846 provided that the various militia officers might be transferred to districts wholly new, that might have been deemed an evasion of the constitution, and so far void; but that act carefully provides that the retained officer shall be the highest in rank in the consolidated district of which his own former district in which he resided should constitute a part. I am satisfied that the alterations made by the act of 1846 did not require new elections of militia officers, and that therefore the relator was in the lawful command of the brigade to which he had been assigned when the constitution adopted in the same year went into operation. The act of May 13th, 1847, called for a change in the relator's district by expressly separating the Long Island counties, by requiring in effect the association of other territory. But that act contained the provision that the brigadier general residing in the district highest in rank (with certain requisites which it is unnecessary to specify, as the relator confessedly had them,) should have the command of the brigade. Under this act, the counties of Putnam and Rockland were added, and the number of the brigade was altered. I have already stated my impression that the addition of territory to the relator's original district did not require a new election. Neither did the change in the number. It could not be seriously contended that the latter change was any thing more than nominal. The relator was, I think, lawfully placed in the command of the new brigade, and continued to hold it until the commission to the defendant was issued. If that commission was valid, it in effect removed the relator from the office of brigadier general of his brigade. I can see but little difference between removing an officer and depriving him permanently of his powers. The one involves as much degradation as the other, and I think is equally prohibited by the constitution. That instrument was not designed to guard the name of the office simply, and to leave the substance unprotected; to retain the husk, while it abandoned the fruit. The governor had not

the power thus summarily to remove the relator. His removal could be effected only by a resolution of the senate, on the recommendation of the governor, or by the decision of a court martial.

The power to issue the commission to the defendant is claimed for the governor under the act of April 17th, 1854. By the 5th section of title 2 of that act, it is provided that brigadier generals shall be chosen by the field officers of their respective brigades. That does not alter the mode prescribed by the existing constitution. Neither does it, nor does any other part of the act purpose to remove those who held the office at the time; on the contrary, the 9th section of the same title directs that whenever the office of a brigadier general is vacant, the commander-in-chief shall issue an order for an election to fill the vacancy. The 43d section of the same title, which is supposed to confer the power upon the governor to commission the defendant without an election, and thus to supersede the relator, is as follows: "The commander-in-chief is hereby authorized and empowered to appoint and commission the brigade, regimental and company officers, necessary to facilitate the organization of all military districts *not now sufficiently organized* to authorize an election. All officers superseded by such appointment shall become supernumerary officers." It is not material to inquire whether this section, if it referred to permanent officers, would not be in conflict with the provision in the constitution relative to their election; and, as it does not appear to have been passed by a vote of two-thirds of the members present in both houses of the legislature, void for that reason, as it contains a qualification which I think makes it inapplicable to this case. The power can be exercised, if at all, only in cases where the district is not sufficiently organized to authorize the election of its officers. The statute does not call for a general re-organization of the militia. If it did, the provision last quoted would for the time annul the method of choosing military officers provided by the constitution. If, as the defendant contends, the relator's brig-

ade had not received a full organization, what was necessary to complete it? Its limits had been defined, the regiments and companies duly designated, and it was (it is to be presumed as nothing appears to the contrary) duly officered. Nothing appears to show any defect in its organization, and as the power claimed was an innovation upon the constitution, it should be construed strictly, and the circumstances under which alone it could be exercised, (if it could be exercised at all,) should have been distinctly stated. The allegation of an inference or conclusion, without setting forth the facts on which it is founded, is insufficient.

The existing seventh brigade had been, as I have already shown, fully organized under the act of 1847, and placed under the relator's command. The act of 1851 (*ch.* 180, § 1) simply authorized, or purported to authorize, the commander-in-chief to appoint and commission the officers necessary to complete the organization of all military districts *not then organized.* This could have no effect upon the relator's brigade, as that had been and was then under a complete and efficient organization. The act of 1854, (*tit.* 4, *art.* 1, § 3) expressly provides that the division, brigade, regimental and company districts should continue to be and remain as the military districts of the state. They were to be subject to such alterations or consolidations as the commander-in-chief should see fit to make. It is unnecessary to inquire whether any and if any what changes would so far effect its organization as to render necessary or sanction an election or appointment of new officers, as no change of this brigade district has ever been made. The provisions in the act of 1854, as to the election or appointment of officers, were not, I think, intended to remove the then existing officers. The statute does not expressly require that, and an intention to create so great, unnecessary, and impolitic a change, ought not to be lightly inferred.

Upon the whole, it seems to me that the governor was not authorized by the act of 1854, or any other statute, to displace

the relator, or to appoint the defendant. Both the commission to the defendant and the general order accompanying it were null and void.

A peremptory mandamus is awarded, but without costs.

[Suffolk Special Term, August 6, 1855. *S. B. Strong*, Justice.]

## Rathbone *vs.* McConnell and Lane.

20 311
39 92
35h 185
50h 541
21a 466

A claim of possession is not a claim of title to land.

In its most comprehensive sense, the term title embraces the possession, but not in the sense in which it is used in the section of the code giving costs to the plaintiff in actions for the recovery of real property, or where a claim of title to real property arises on the pleadings, or comes in question.

As there used it is nothing less than an assertion of a right of possession.

In an action to recover damages for the diversion of water from land, of which the plaintiff alleges he is the owner and in the possession, the act done being above his land and the injury consequential, it is not necessary for the plaintiff to prove, in regard to his right or interest, any thing further than that he was in possession of the premises at the time of the injury.

The party in possession is the proper person to bring such an action.

The owner, if not in possession, cannot maintain an action, except for an injury to his reversionary interest, and under a complaint presenting such a case.

A parol license to divert water from a water course, so as to prevent it from passing over another's land, is valid.

Where the object of an action was to recover damages, sustained in consequence of an act done by the defendants above the plaintiff's land, by which the water of a water-course, passing over such land, was diverted and the plaintiff deprived of the use of it, the defendants alleged as a defense, that the act was done with the leave, license and permission of the plaintiff. *it was held*, that the answer was to be viewed as setting up a mere license, and that under this issue the title to the land did not come in question, so as to entitle the plaintiff to costs under the 304th section of the code.

APPEAL by the defendants from an order made at a special term, reversing and setting aside a decision of the clerk of Steuben county, refusing costs to the plaintiff and allowing costs to the defendants. The order appealed from further directed that the plaintiff be allowed his costs in the action, and that the same

be adjusted by the clerk, on application, and inserted in the judgment in the usual manner, as provided by statute. The complaint was as follows: "Isaac Rathbone, the plaintiff in this action, complains of Aaron McConnell and Ira Lane, the defendants herein, and says that he the said plaintiff, for a long time past, has been and still is the owner and in the possession of certain lands and premises, with the appurtenances, in the town of Howard, in the county of Steuben, and used by him for farming and agricultural purposes, and for the pasturing, raising and keeping of cows, cattle and horses, and was at the time of the committing of the wrongs and injuries hereinafter mentioned, entitled to have and enjoy the benefit and advantage of the water of a certain stream or water-course for the irrigating of the said lands and premises, and improvement of the soil thereof, for the supplying of his cows, cattle and horses with water, and for agricultural purposes, which, until the diversion thereof as hereinafter mentioned, had run and flowed, and still of right ought to run and flow, upon and across the said lands and premises. That the said defendants, on or about the first day of March, 1853, and on divers days and times between that day and the commencement of this action, in the town of Howard aforesaid, wrongfully and unjustly cut, dug and made, and caused to be cut, dug and made, divers sluices, trenches and channels in and out of the sides and banks of the said stream or water-course, and laid pipes or pump-logs in said stream or water-course, above the said lands and premises of the said plaintiff, and ever since has kept and continued, or caused to be kept and continued, the said sluices, trenches and channels and the said pipes and pump-logs, and thereby during all the time aforesaid, unlawfully and wrongfully diverted and turned the water of the said stream or water-course away from the said lands and premises of the said plaintiff, and stopped and prevented and hindered the water of the said stream or water-course from running and flowing along its usual course upon and over the said lands and premises as the same of right ought to have done, and otherwise would have done, and deprived the said plaintiff of the use, benefit and advantage of the said wa-

ter for the purpose of irrigating his said lands and premises, the improvement of the soil thereof, and for the watering of his cows, horses and cattle, and for all agricultural, farming and domestic purposes, and by reason thereof the water of the said stream or water-course sufficient for the supplying the said plaintiff with water for the purposes aforesaid, during all or any part of the time aforesaid, could not nor did not flow upon and across the said lands and premises as the same of right ought to have done and otherwise would have done; and the said plaintiff thereby, for want of sufficient water could not, during the time aforesaid, use and enjoy his said lands and premises or follow or exercise his said business of farming, and of raising, pasturing and keeping of cattle, horses and cows in so large, extensive and beneficial a manner as he might and otherwise would have done, but was thereby deprived of the full and ample use and enjoyment of his said lands, and of all the benefits, profits, gains and advantages which he otherwise might and would have made and derived from the cultivation thereof, and by carrying on his said business thereon. And the said plaintiff says that by reason of the premises aforesaid he has suffered and sustained damage to the amount of one thousand dollars, for which sum, together with costs, he demands judgment against the said defendants."

The defendants, by their answer, denied all the allegations in the complaint. And for a further answer to so much of the complaint as related to the plaintiff's being the owner and in the possession and occupation of the premises mentioned in the complaint, and of the use made by him of the same, and whether he was entitled to have and enjoy the benefit and advantage of the water of a certain stream or water-course for the irrigating of the said lands and premises and other purposes as was alleged in the said complaint, the defendants averred that they did not know and had not any knowledge or information thereof sufficient to form a belief. And for a further answer to the complaint the defendants denied that they, "on or about the first day of March, 1853, or at any other time, in the town of Howard aforesaid, unlawfully or

wrongfully diverted and turned the water of the said stream or water-course away from the lands and premises of the said plaintiff, or stopped, prevented or hindered the water of the said stream or water-course from running and flowing along its usual course upon and over the said lands and premises as the same of right ought to have done. And said defendants deny, and each of them denies, that they deprived the said plaintiff of the use, benefit or advantage of the said water for the purpose of irrigating his lands and premises, or for any other improvements or purpose whatever. And for a further answer to the said complaint, these defendants say, that in the year 1853, they, with other citizens of the village of Howard in the county of Steuben, at the request and solicitation, and with the leave, license, permission and consent of the said plaintiff, first made, given and granted, made and constructed an aqueduct to convey and by means of which they did conduct and convey the water of a certain spring to the said village of Howard for the purpose of supplying the inhabitants of the said village with water, which is the unlawful and wrongful diversion and turning of the water of the said stream or water-course away from the lands and premises of the said plaintiff, alleged in the said complaint."

*E. Howell*, for the appellants.

*W. Barnes*, for the respondent.

*By the Court*, T. R. Strong, J. The plaintiff alleges in his complaint that he "for a long time past has been, and still is, the owner and in the possession" of the lands and premises; and the defendants in their answer put the allegation in issue, by denying it generally, and also by averring that they "have not any knowledge or information thereof sufficient to form a belief." In order to determine whether a "claim of title to real property arises on the pleadings" thus far given, within the meaning of section 304 of the code, it is important to consider what was necessary to be proved on the part of the plain

tiff upon the issue, in order to maintain the action. The action, under the former system of pleading, would be termed an action on the case, and the injury complained of, a nuisance. The act done, by which the water-course was diverted, was done above the plaintiff's land, and the injury to the plaintiff was consequential. (*Crabb's Real Prop.* § 430, 433.) It was obviously not necessary for the plaintiff to prove, in regard to his right or interest, any thing further than that he was in possession of the premises at the time of the injury. In 1 *Chitty's Pl.* 330, (*Phil. ed. of* 1828,) it is stated, in regard to injuries to real property, corporeal or incorporeal, that it is now fully settled, that in a personal action against a wrongdoer, for the recovery of damages, and not the land itself, it is sufficient to state in the declaration, that the plaintiff, at the time the injury was committed, was possessed of the premises. (*See also Crabb's Real Prop.* § 409, 410.) The precedents only allege possession. (2 *Chitty's Pl.* 788, 769.) And it is not necessary to prove more than need be alleged. It is equally clear, I think, that proof of possession was necessary, and that without it the action could not be supported. The party in possession was the proper person to bring the action. The owner, if not in possession, could not maintain an action, except for an injury to his reversionary interest, and under a complaint presenting such a case. (*Crabb's Real Prop.* § 433, 443. *Arch. N. P.* 409, 410.) Chitty says, "when a reversioner sues for an injury to land, &c., in possession of his tenant, his interest must be described accordingly." (1 *Chitty's Pl.* 330.) And such is the precedent of a declaration in such a case. (2 *id.* 778.) It must be expressly alleged that the reversion has been prejudiced. (*Id. in notes.*) As the complaint in this case is framed, the injury to the possession is the gist of the action. The allegation of ownership does not at all enlarge the issue to be tried. An issue upon the ownership alone, aside from the question of possession, would be immaterial. The issue formed is practically and substantially a claim of possession on one side, denied on the other. Undoubtedly upon the issue made, evidence of title, in connection with the fact that the premises were unoccupied, if

such was the case, was competent for the plaintiff, with a view to prove a constructive possession, which would have been sufficient. But such evidence would have been equally admissible if possessiou only had been alleged. Had it appeared on the trial that the premises were vacant, and the plaintiff had given evidence of title, to prove a constructive possession, the case would have been one of a claim of title arising on the trial; but it will not be assumed upon the pleadings, in the place of an allegation of possession, that the premises were vacant, and that proof of title was necessary. It will be intended by the allegation of possession, that the plaintiff was in actual possession. A claim of possession is not a claim of title. In its most comprehensive sense, the term title embraces the possession, but not in the sense in which it is used in the provision under consideration. As there used it is nothing less than an assertion of a right of possession. (*Brown* v. *Majors*, 7 *Wend.* 495. *Ehle* v. *Quackenboss*, 6 *Hill*, 537.)

If under the liberal system of pleading of the code, the plaintiff might, under this complaint, recover as a reversioner for an injury to his reversionary interest, he will not, at least, looking at the pleadings alone, be regarded as making any such claim.

It is further alleged in the complaint, that the plaintiff was "entitled to have and enjoy the benefits and advantages of the water" of the stream or water-course across his land; and this allegation is denied in the answer. This right is not averred, in terms, to be an incident to the land, but upon the case, as stated in the complaint, it is prima facie an appurtenant to the premises. It would be supported by proof of possession alone. And if the issue is broad enough to admit evidence of a right independent of the land, derived from an agreement or license, I think it must not be understood from the complaint alone, that such a right was intended to be averred. The plaintiff will be regarded as intending to claim the use of the water as an appurtenance. In this view the right is involved in the issue as to the possession. And no claim of title to real property arises on the pleadings relating to it, for the reason already stated, that a claim of possession is not a claim of title.

The defendants, in the answer, in addition to denying the complaint, set up as an affirmative defense, that they, with others, "at the request and solicitation, and with the leave, license, permission and consent of the plaintiff, first made, given and granted, made and constructed an aqueduct to convey, and by means of which they did conduct and convey, the water" to a village named, for the purpose of supplying the inhabitants with water. This defense must be deemed controverted under section 168 of the code. It was held by the learned justice at special term, that this issue raises a question of title to real property, for the reason that the defendants set up a permanent right derived by deed from the plaintiff to the water of this water-course, which right was part of the plaintiff's freehold. If this is a correct construction of the answer, the conclusion drawn from it is right; but is this a fair and just construction? The object of the action is to recover damages sustained in consequence of an act done by the defendants above and off the plaintiff's land, by which the water of a water-course, passing over the plaintiff's land has been diverted, and the plaintiff has been deprived of the use of it. It is set up in defense that the act was done at the request and solicitation, and with the leave, license, permission and consent of the plaintiff, first made, given and granted. This permission is expressly designated by the defendants as a license, and the answer is in the ordinary form of a plea and answer of license. (3 *Chitty's Pl.* 1106.) The words, "given and granted," do not enlarge the answer; it is the "leave, license, permission and consent," and nothing more, that were granted. If the matter of the defense is available as a license, the defendants having named and presented it as such, that should be regarded as its scope and operation. That it is valid as a license is, I think, well settled by authority. In *Pierrepont* v. *Barnard*, in the court of appeals of this state, (2 *Selden*, 279,) it was held, that a parol license by the owner of land to cut and carry away standing timber, fully executed before revocation, was a complete protection for what was done under it. The principle of that case is directly in point. The trees were as much a

part of the freehold as the right to the use of the water. (*Green* v. *Armstrong*, 1 *Denio*, 550.) The diversion of the latter might be justified under a license, as well as the cutting of the former. *Liggins* v. *Inge*, (7 *Bingham*, 682; 20 *Eng. Com. L. Rep.* 287,) also goes directly in support of the validity of the license. It was an action on the case for wrongfully continuing the diversion of water from the plaintiff's mill, and the facts and question to be decided, as briefly stated in the opinion of Tindall, Ch. J., were these: "It appeared in evidence before the arbitrator, that the bank of the river which had been cut down, was the soil of the defendants; and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the defendants, and at their expense, in the year 1822, under a parol license to them given for that purpose by the plaintiff's father, the then owner of the mill; and that in the year 1827 the plaintiff's father represented to the defendants that the lowering and cutting down the banks was injurious to him in the enjoyment of his mill, and had called upon them to restore the land to its former state and condition; with which requisition the defendants had refused to comply. The question therefore is, whether such non-compliance, and the keeping of the weir in the same state after, and notwithstanding the countermand of the license, is such a wrong done on the part of the defendants as to make them liable in this action." After stating the argument on the part of the plaintiff, and some remarks in reference to it, the chief justice observes: "But we think the operation and effect of the license, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burthen of restoring to its former state what has been done under the license, although such license is countermanded, and consequently that they are not liable as wrongdoers for persisting in such refusal." The views of the court are given by the chief justice at considerable length, and it is also held, that the license, after it was executed, was not countermandable. That was much further than it is necessary to go in this

case. That case is referred to with approbation in *Smith* v. *The Birmingham and Staffordshire Gas Light Co.* (1 *Adol. & El.* 526; 28 *Eng. Com. Law. Rep.* 140;) and in *Wood* v. *Manley*, (11 *Adol. & El.* 34; 39 *Eng. Com. L. Rep.* 19.)

The case of *Otis* v. *Hall*, (3 *John.* 450,) decides that such a license is valid, and also that setting it up does not raise a question of title. The action was a special action on the case, for overflowing the plaintiff's land, by means of a mill-dam erected by the defendant on his own land. On the trial the defendant proved that he had permission to erect the dam, and overflow the plaintiff's land if necessary for the use of the mill. On a motion by the plaintiff for full costs, under a statute then existing, on the ground that the title to lands came in question, the court, after stating the question, and expressing the opinion that the freehold or title did not come in question, within the purview of the statute, say: "The case bears no analogy to that of *Heaton* v. *Ferris*, (1 *John.* 146.) Here was no claim of a right of entry into the plaintiff's land, nor of any direct use or enjoyment of it. The defendant merely sets up a right to use his own land in the manner he has done, by erecting the dam; that any consequential injury to the plaintiff was waived by his express license for that purpose; and that it was a mere *damnum absque injuria*, for which the plaintiff had no right of action. The statute only applies to cases where a claim or question to the direct use by entry on another's land comes in controversy. This and many other cases of consequential injuries as for nuisances erected on the defendant's own land, do not in any manner bring the title in question. Nor does the setting up a leave or license by the plaintiff raise a question as to the title, or give any right or interest in the plaintiff's land." If a license to flow land with water is valid, it would seem that a license justifying the alleged wrongful diversion of water from it must be, at least until revoked. The case of *Chandler* v. *Duane*, (10 *Wend.* 563,) was a motion for costs to the defendants, and similar to that last cited. Sutherland, J., says, "the action and the ground of defense, and all the circumstances in the case, were precisely

the same as in this," and the same principle was applied. (*See also Clinton* v. *McKenzie*, 5 *Strobhart*, 36.)

Viewing the portion of the answer in justification of the act complained of in the complaint, as setting up a mere license, it is very plain that no question of title was raised by putting the same in issue. (*Mumford* v. *Whitney*, 15 *Wend.* 380. *Wickham* v. *Seely*, 18 *id.* 649.)

The case of *Powell* v. *Rust*, (8 *Barb.* 567,) is entirely unlike the present. The decision in that case, that a claim of title arose on the pleadings, was placed upon the ground that Rust claimed, by virtue of an agreement with the plaintiff, the property in, and the right to enter with teams and take away certain growing trees and shrubs, which were part of the land. Here, no transfer to the defendant of a right to the use of the water is asserted, but only a permission to do an act by which the diversion of the water was effected. If the license may not be revoked, it is not because it conferred any interest in the use of the water upon the defendant, but because it operated as a yielding up and relinquishment of the water diverted. (*Liggins* v. *Inge, above cited.*)

*Mumford* v. *Whitney*, above referred to, is the case of a claim by the defendant to a permanent interest in the plaintiff's land. *Davis* v. *Townsend*, (10 *Barb.* 333,) contains only the same doctrine.

For the foregoing reasons, I am of opinion that no claim of title to real property arises on the pleadings in this case; hence the decision at special term should be reversed.

[Monroe General Term, September 3, 1855. *Selden*, *Johnson* and *T. R. Strong* Justices.]

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## The Trustees of the Theological Seminary of Auburn *vs.* Almeron H. Cole adm'r &c. of Chloe Hyde, deceased.

Where there is a bequest of the whole residue of the testator's estate, after payment of debts and legacies to one person for life, limited as to part, upon a contingency, to the use thereof for life, with a valid gift over of that part, upon the happening of the contingency, and as to the rest, absolute of the entire estate, as to the part of the estate to which the contingency relates, the income only can be paid to the residuary legatee; but as to that portion of the estate respecting which the bequest is absolute, the principal must be paid.

The gift over does not attach to the entire residuary estate, so as to render the whole a security for its payment, but the executor may, as to the legatee, set apart a principal sum sufficient to discharge the gift, and proceed to satisfy the other legacies.

And the residuary, or any other legatee, who has been paid his legacy, will not, in case of a subsequent deficiency of assets to pay the gift, from the waste of the executor, be obliged, for that reason, to refund any part of what he has received.

The residuary legatee is not entitled, before the happening of the contingency, to demand of the executor, on account of the legacy to him, any thing further than the balance of such legacy, after deducting a sum sufficient to pay the contingent gift when it shall become payable.

The administrator of the residuary legatee is not liable to the contingent legatee, for the payment of the contingent gift, after the contingency has occurred, without at least an allegation, and proof, that his intestate, or himself, has received more than the intestate was entitled to receive, and of such other circumstances as would clothe him with the character of a trustee for the plaintiff as to the excess.

ACTION to recover the two last installments, of $2500 each, of a legacy of $10,000, claimed to have been given by David Hyde, of Auburn, to the plaintiffs, by his will executed April 10, 1824, and which took effect by his death on the 12th day of April in the same year. He left real estate of the value of $12,000, and personal of the value of $20,000. The clause of the will under which the claim was made, and which was preceded by certain specific bequests, was as follows:

"I give, devise and bequeath *all the rest and residue of my estate, both real and personal*, which shall remain after payment of my debts, funeral charges and legacies above mentioned, unto my daughter, Chloe Hyde, *her heirs and assigns forever; and if she should die without lawful issue*, then I give and bequeath

unto the Theological Seminary, of Auburn, in the state of New York, the sum of ten thousand dollars for the purpose of endowing a professorship in said seminary, to be paid to the said trustees *in four equal annual payments, after the death of the said Chloe.* I give *the custody, tuition and guardianship of the person* of my said daughter Chloe to my brother-in-law, Daniel Kellogg, Esq. until she shall attain the age of twenty-one years; and all or such part of my said estate as he shall deem necessary shall be applied for her maintenance, education and support." Daniel Kellogg was named as executor, with power to sell the real estate, and received letters testamentary in May, 1824. Chloe Hyde, the only daughter of the testator, became 21 years of age August 16th, 1837, and died on the 21st May, 1850, intestate and without issue, and the defendant, in July, 1851, received letters testamentary upon her estate. The executor paid her expenses during his life, and for some part of the time she resided in his family. He sold most of the real estate during his life, and the proceeds were received in part by him, and the residue by the executors of his will. He did not keep the assets of the estate separate from his private estate, but kept an account of his receipts and payments, making himself debtor for all the receipts, and crediting himself with all payments. Daniel Kellogg died May 4, 1836, and at his death all the assets of the estate of David Hyde, except what he had expended in the settlement of the estate, the payment of legacies, and the maintenance and education of Chloe Hyde, "remained absorbed in his estate, and passed as such into the hands of the executors of his will." Chloe Hyde never received into her possession, or exercised any actual control over, any part of the assets, beyond the sum required for her support, until August 1, 1849, when the executors of the will of Daniel Kellogg paid to her, by the conveyance of real estate, $47,000; and they subsequently paid her small sums for her support, until her death. She did not receive, during her life, so much in the aggregate as was due to her for the interest and income of the estate. On the 1st of January, 1852, the defendant entered into a written agreement with the executors of the will of Daniel Kellogg, by

which the sum due to him as administrator, from said executors, was fixed at $50,000; on account of which they then paid him in bonds and mortgages $31,775.27, and on the 1st of July, 1853, in lands, $12,000, and the balance remains unpaid.

The jury found a special verdict containing the above and other facts; upon which the justice who tried the cause, ordered a judgment for the plaintiffs, for the amount claimed, with interest. For further facts see the same case, when formerly before the court, 18 *Barb.* 360.

*John Porter*, for the plaintiffs. I. The legacy given by David Hyde's will to the plaintiffs, is good and valid in law as an executory bequest. The provision in the will specifying the times of payment, is conclusive to show that the testator did not, by the expression, "dying without lawful issue," intend any other than issue living at the death of Chloe Hyde. (4 *Kent's Com.* 282. *Hill* v. *Hill*, 4 *Barb.* 419. *Jackson* v. *Staats*, 11 *John.* 337. *Fosdick* v. *Cornell*, 1 *id.* 440. *Moffat* v. *Strong*, 10 *id.* 12.)

II. The bequest to Chloe of all the rest and residue of his real and personal estate, did not, so far as the amount of the legacy in question is concerned, give her an absolute property in the same, nor a right to dispose of the same in her lifetime. She only took a conditional interest therein, depending on the event of her leaving issue at her death, to determine whether it was absolute or not. (*Jackson* v. *Bull*, 10 *John.* 19. *Hill* v. *Hill*, 4 *Barb.* 419. *Helmer* v. *Shoemaker*, 22 *Wend.* 138. *Lott* v. *Wyckoff*, 1 *Barb.* 572, 576. 2 *Kent's Com.* 270.)

III. The guardian of Chloe had the power to apply to her maintenance, education and support, only so much of the estate as he should deem necessary for that purpose; this did not give him the absolute control over all the remainder devised and bequeathed to Chloe by the will. It is only when absolute ownership, and right of disposal of property, is given by the will, that the limitation over is held to be void, as inconsistent with the executory devise. (*The Attorney Gen.* v. *Hall*, *Fitzg.* 314. *Ide* v. *Ide*, 5 *Tyng*, 500. *Jackson* v. *Bull*, 10 *John.* 19.

*Livingston* v. *Delancy*, 13 *id.* 537. *Jackson* v. *Robins*, 15 *id.* 169.) Again, the power of disposal of any portion was given to the guardian, and not to Chloe, the cestui que trust. And it was given for a particular, defined and limited object, and to be limited to the necessity of the case. To contend that the guardian, under this clause, had the absolute power of disposal of the whole property, would be a manifest violation of the intention of the testator, as evinced by the whole will.

IV. Daniel Kellogg, the testamentary guardian of Chloe, though spoken of in the will as only guardian of her person, became, as such, guardian of her estate also; and it became his duty, imposed by statute, to take the management of her estate as such guardian. (2 *R. S.* 150, §§ 1, 2, 3.) Kellogg, being both executor and guardian, the law will presume, after a reasonable time has passed for settling all claims against the estate, that he held the funds in his hands as the guardian of Chloe (*Karr* v. *Karr*, 6 *Dana*, 3.)

V. When Chloe became 21 years of age, she was not only entitled to the whole fund and its increase, except such parts thereof as had been paid out according to the directions of the will; but she had the legal possession of it—the actual possession of the executors of Kellogg was her possession. If the fund existed in the shape of securities for money, they held them for her use; if in the shape of a debt due from the estate of Kellogg, the legal possession was in her.

VI. There is no foundation for the claim set up in the answer, that the legacy given to the plaintiffs was payable, if at all, out of the specific, original fund left by the testator at his decease, to be found either in the will or in law. After Chloe became of age, she held the whole fund, with its increase, in her own right, subject however, in the contingency that has occurred, to pay from her estate the plaintiff's legacy. It was a contingent trust in her.

VII. The defendant, as administrator, became entitled to all the personal property of Chloe, in whatever shape it existed, in money, stock, securities for money, debts, or in any other way; and his responsibility to answer for any claims against the es-

tate of Chloe can never be discharged, while any assets remain that may become available. (2 *R. S.* 82, § 6. *Wooden* v. *Bagley*, 13 *Wend.* 456. *Beecher* v. *Crouse*, 19 *id.* 306. *Jenkins* v. *Freyer*, 4 *Paige*, 47.)

VIII. The plaintiffs are authorized to receive and hold the legacy in question by their act of incorporation, and the laws of the state. (*Sess. Laws of* 1820, *p.* 197; *of* 1840, *p.* 267; *of* 1841, *p.* 245. *Yates* v. *Yates*, 9 *Barb.* 324. *King* v. *Rundle*, 15 *id.* 139.)

*H. R. Selden*, for the defendant. I. Chloe Hyde, under the will of her father, took an estate *in fee* in the lands, and an *absolute* estate in the personal property. The gift over, of $10,000, to the plaintiffs, is therefore void. 1. The governing principle in the construction of a will, as of every other instrument, is, that the intention of the maker is to be ascertained, and effect given to it so far as is consistent with the rules of law. 2. If that intention, when ascertained, is unlawful, it is as much the duty of courts to defeat it, as it is to effectuate it when lawful. (11 *Wend.* 294, 299, 301. 1 *Sandf. Ch.* 274.) 3. It was the intention of the testator here to give to his daughter Chloe, an estate *in fee* in his lands, and a like *absolute estate* in his personal property, subject to be defeated on her death, as to $10,000 (if so much remained unexpended by her,) in case she died without issue living at her decease; the $10,000 to be in that event paid to the plaintiff. To determine the question of intention, I insist: (1.) That the will in the clearest terms disposes of the testator's *entire estate, real and personal*, and shows that it was not his intention *to die intestate with regard to any part of it.* The expression "all the *rest and residue* of my estate, both real and personal," without the added words, of inheritance, would have given to the devisee an estate in fee. (6 *John.* 191, *and cases cited in notes c and d;* 16 *id.* 555, *Jones and Van Buren, arguendo; Id.* 587, *Kent, Chancellor;* 11 *id.* 374, *Yates, J.;* 1 *T. R.* 411.) But the testator, to remove all possible doubt, not only gave to Chloe "the rest and residue of all his estate," but gave it to *her*, "*her heirs and assigns*

*forever*." (2.) The plaintiff's construction must reduce the interest of the devisee in the lands, contrary to the express terms of the will, from a fee to a life estate, and her interest in the personal estate to a *life use of it only*, and would make the testator die intestate as to the remainder of his estate, after the termination of the life interest, and the payment of the plaintiff's legacy. (3.) Not only is the *entire estate* given to Chloe and her heirs, but the *express power of disposition* of it is given to her, by the *most appropriate and comprehensive* of legal terms, for that purpose, viz: to "*her heirs and assigns forever*." (4.) If only a life interest was given to the daughter, there was at least a possibility that the income might not be sufficient for her education and support, and that possibility was in the mind of the testator when he gave to her guardian power to apply "all or any part" of the capital of the estate to that object. That guardianship could only continue till she arrived at the age of 21. Did the testator, intend that after arriving at maturity, his daughter should have no power over the body of the estate which he left to provide for her wants, should it be necessary? Could she appropriate no part of it, in case of marriage? Such a construction as is claimed by the plaintiff would both contradict *the letter* of the gift to her, and do violence to *the whole spirit of the will.* (5.) I infer from the case already decided upon this will that the plaintiff's counsel and the court assume that Chloe Hyde took an absolute estate in all which was given to her, except the $10,000 claimed by the plaintiff; and as to that, that she took "only the use, unless she should have issue living at her death, and that if she should not have such issue, the same should go to the plaintiffs." (18 *Barb.* 375, 383, *point* 4, 384-5.) I think there can be no distinction in her claim to the different parts, at least, of the *personal* estate. If the plaintiffs' claim is valid, it extended, *as against her, to every part of that estate*, reducing her right in the whole to the mere use of it for her life, the title being in the executor, in trust for the plaintiffs, to the extent of $10,000, and for the next of kin, not of Chloe Hyde, but of David Hyde, as to the surplus, if any. (*Jeremy's Eq. Jur*

104. 1 *P. Wms.* 550, *and note* 1. 2 *Story's Eq. Juris.* § 1067. 1 *id.* §§ 540, 596, 606, *note* 1.) This result is in conflict with *the letter, and the whole scope and spirit of the will.* For these reasons, it is insisted that the testator *intended what he said* when he gave the entire residue of his estate, not before disposed of, to his "daughter, Chloe Hyde, *her heirs and assigns forever.*" 4. An *absolute* disposition having been previously made by the will of the whole property, the gift over to the plaintiffs on the death of Chloe Hyde without issue was void. (1.) The legacy was never charged on the real estate, and the plaintiffs could never reach that or its proceeds, whether their legacy was valid or not. (*Lupton* v. *Lupton*, 2 *John. Ch.* 614, 623. *Swift* v. *Edson*, 5 *Conn. R.* 531, 536. *Gridley* v. *Andrews*, 8 *id.* 15. 2 *Story's Eq. Jur.* § 1247, *note* 2, *p.* 703, 6*th ed.*) The power of sale given to the executor, does not (until exerted) affect the title, nor work an equitable conversion of the real into personal estate. It requires a positive direction to produce that result. (*Leigh & Dalzell on Equitable Conversion, p.* 15.) (2.) The testator having given his personal property to his daughter, with power to dispose of it during her life, the gift over was void. (*Jackson* v. *Bull*, 10 *John.* 19. *Jackson* v. *Delancy*, 13 *id.* 537. *Jackson* v. *Robins*, 16 *id.* 587, 588, 589. *McDonald* v. *Walgrove*, 1 *Sandf. Ch. R.* 274. *Ross* v. *Ross*, 1 *Jac. & Walk.* 154, 158, *note a. Child* v. *Baily*, *Cro. Jac.* 459. *Paterson* v. *Ellis*, 11 *Wend.* 276. *Ide* v. *Ide*, 5 *Mass. R.* 500.) "If the *absolute property or right of disposal* is given to the first taker, he may defeat the devise over, and therefore it is void." (*Per Savage, C. J.*, 11 *Wend.* 277.) The words limiting the gift over, to what the first taker should "die possessed of," and other similar expressions found in a number of cases, are only effectual to defeat such gift because they "*imply* a power of alienation by the devisee." (10 *John.* 20.) An *express* power of alienation expressed by a gift to one his "*heirs and assigns forever*," must be as effectual as an implied power for that purpose. (3.) Even if Chloe Hyde had not power to dispose of the estate, such power was given to the executor *for*

*her benefit*, and must have the same effect upon the gift over as though it were conferred upon her. "It is essential to the validity of an executory devise, that it cannot be defeated by the first taker." (*Paterson* v. *Ellis*, 11 *Wend.* 277. *Lewis on Perpetuities*, 135. 8 *Coke*, 96, *a.*) "The same doctrine that executory interests cannot be barred by the act of the first devisee extends to executory dispositions of personal chattels." (8 *Coke*, 96, *a ; note D. Fraser's ed.*) (4.) The bequest to the plaintiffs, being not specific, but general, and if it affects at all the personal estate given to Chloe Hyde, touching it only in part, cannot have the effect to defeat the *otherwise absolute* gift made to her, either wholly or partially. "A condition or limitation annexed to an estate ought to destroy the whole estate to which it is annexed, and not part of it." (1 *Coke*, 86, *b.*) This principle is applied to the quality and not to the quantity of the estate; but there is good reason, in cases like the present, for applying a similar principle to the *quantity* of estate and requiring that it should determine the whole. Here was $20,000 in value of personal estate given to Chloe Hyde, and but for this conditional gift over of $10,000 to the plaintiff, all would concede that her title was absolue. Is it proper to hold that this gift over of $10,000, should render the whole $20,000 inalienable for her life? If that question has an affirmative answer, then the gift over of $10,000 would produce the same result, and would do so even if the estate were $100,000. It may be said that the gift over would affect the alienability of only the $10,000 and not of the excess. I think otherwise, for the reason that the plaintiffs' legacy, if valid, is charged on the whole *personal* estate, at least, and must be paid, though it exhaust it all; and neither executors, nor courts, unless they can make a new will for the deceased, can set apart any specific $10,000, and say that the legatees' contingent claim shall be limited to that, and that the holder of the life interest may sell the balance. If this were done, and that which should be set apart should fail to pay the legacy, the legatees could follow the other parts of the estate, even into the hands of bona fide purchasers. (*Wilson on Springing Uses*, 36 *et seq.*) If our

view of this question is not correct, it is at least incumbent on the plaintiffs to produce some case, where a like conditional bequest over of a *part only* of what had been previously given, has been held valid.

II. Admitting the legacy to be valid, the plaintiffs have no claim whatever against *this defendant* on account of it. 1. The assent of the executor is indispensable to perfect the title of every legatee, either in law or equity, and whether the legacy be general or specific. (2 *Williams on Ex.* 1176, 1177.) In all cases of devises of personal estate, the whole vests in the executor, and therefore no legacy can come out of the executor without his consent. (2 *Atk.* 598.) Courts of equity however, considering the executor as a trustee, will compel his assent, in proper cases. (1 *Story's Eq. Jur.* §§ 540, 591, 593.) It is not perceived in the absence of the executor, and without either *allegation* or *proof* that he has ever assented to this legacy, how a recovery can be had against the defendant, assuming that he is shown to possess the funds that ought to pay it. Even if the legacy was of a *specific chattel*, I can see no ground on which there could be a recovery without showing the executor's assent. (*Doe* v. *Guy*, 3 *East*, 120. 1 *Strange*, 70.) 2. The assent of the executor would not aid the plaintiff here. In case of a specific legacy, the assent of the executor vests *the title* in the legatee, and he may sue at law and recover it. (1 *Strange*, 70. 8 *Coke*, 96 *a. Plowden*, 544 *a.* 3 *East*, 120.) But in case of a general legacy, the assent of the executor to its payment, could not give the legatee any title to a portion of the assets in the hands of a stranger. If there were a dozen strangers, each having $1000 of the assets, could the legatee maintain suits against each? 3. This defendant, however, has received no assets belonging to David Hyde's estate, and the plaintiffs have no claim upon any other. What was paid to the defendant, was only what he was entitled to receive as administrator, from the executors of Daniel Kellogg. He had no right to demand of them any portion of the $10,000, (if the plaintiffs' claim is valid,) and did not demand or receive it. 4. But if he did demand and obtain it, he did it, not as administrator, but in his

private character, and in that character only is responsible for it. As administrator of Chloe Hyde, (if the plaintiff's claim is valid,) he had no more right to the $10,000 than any other stranger, and if he demanded and obtained it, he did it in his own wrong, and cannot *for such wrong create a claim against the assets of Chloe Hyde.*

III. The plaintiffs had no power, under their charter, to execute the trust created by the legacy in question. (*Robertson* v. *Bullions*, 1 *Kernan*, 243, 254 *et seq.*) The trustees have only the power of applying the avails of the institution "from time to time to the purposes of the institution, in such way and manner *only*, and in such sums as shall be appointed and directed by the board of commissioners," mentioned in the act. (*Laws of* 1820, *p.* 198, §§ 3, 5.) How can a board so constituted administer this trust? If the commissioners direct them to invest the fund in a library instead of the endowment of a professorship, must they not do it?

*By the Court*, T. R. STRONG, J. In the case of the present plaintiffs against the present defendant and others, (18 *Barb.* 360,) we decided, after full and careful consideration, that the legacy in question, of David Hyde to the plaintiffs, was valid, and we must follow that decision in this case. But it is insisted by the defendant, that admitting the legacy to be valid, the claim made by the plaintiffs against him cannot be supported; and I am of opinion that they are not entitled to recover in this action. An essential position to the validity of the legacy is, that the residuary bequest to Chloe Hyde, to the extent of the amount of the legacy, is of the use only of the subject of the bequest, unless she should have issue living at her death; and another position connected with that, and well sustained by authority, is that it was the duty of the executor of David Hyde to retain of the estate bequeathed during the life of Chloe, the charge of a principal sum equal to the amount of the legacy, and pay over to her only the interest on the same. In *Spear* v. *Tinkham*, (2 *Barb. Ch. Rep.* 211,) the late chancellor says, "as a general rule, where there is a bequest of the whole of the

testator's personal estate, or of the residue thereof, after payment of debts and legacies, to one person for life, with a remainder over to others after the termination of such life estate therein, the whole must be converted into money, and invested in permanent securities by the executor, and the income paid over to the person entitled to the life estate. (*See also Shuler* v. *Covenhoven*, 2 *Paige*, 122, *and cases cited.*) The same principle applies where, as in the present case, the bequest is of the whole residue, limited, as to part, upon a contingency, to the use thereof for life, with a valid gift over of that part, upon the contingency, and as to the rest, absolute of the entire estate. In such a case, as to the part of the estate to which the contingency relates, the income only can be paid to the residuary legatee, but as to that portion of the estate as to which the bequest is absolute, the principal must be paid. The gift over does not attach to the whole residuary estate, so as to render the whole a security for its payment, but the executor may, as to the legatee, set apart a principal sum sufficient to discharge the gift, and proceed to satisfy the other legacies. And the residuary, or any other legatee, who has been paid his legacy, will not, in case of a subsequent deficiency of assets to pay the gift, from the waste of the executor, be obliged, for that reason, to refund any part of what he has received. (*Wolcott* v. *Hall*, *Bro. C. C.* 305. *Lupton* v. *Lupton*, 2 *John. Ch.* 614. *Story's Eq. Juris.* § 92.) Chloe Hyde was not therefore in her lifetime entitled to demand of the executor of her father, or of the executors of that executor, on account of the legacy to her, any thing further than the balance of the legacy, after deducting a sum sufficient to pay the contingent legacy to the plaintiffs; and the rights of her administrator are no greater than were hers. And in this view of the case, I do not perceive how the defendant can be liable to the plaintiff for the payment of the legacy, without at least an allegation, and proof, that his intestate, or himself, has received more than the intestate was entitled to receive, and of such other circumstances as would clothe him with the character of a trustee for the plaintiffs, as to the excess. But no such case is made by the complaint or the proofs. The ground on which the

counsel for the plaintiffs rests their right to recover, in relation to the point under consideration, is that Chloe Hyde, on becoming of age, was entitled to the whole fund and its increase, deducting payments made in pursuance of the will, and had the legal, although the executors of Kellogg, the executor of David Hyde, had the actual possession thereof; that she held the same in her own right, subject to a contingent trust in favor of the plaintiffs to the extent of their legacy; and that the defendant, as administrator of Chloe, is entitled to all the assets of, and responsible for all claims against, her estate, while any assets remain that may become available. It is obvious that it was with this view of the legal rights and obligations of the parties, the complaint was framed. The errors in this position are fully disclosed in the views already presented.

In my opinion the defendant is entitled to judgment on the verdict.

[Monroe General Term, September 3, 1855. *Selden*, *Johnson* and *T. R. Strong*, Justices.]

## Stephens *vs.* The Buffalo and New York City Rail Road Company.

Delivery is essential to the validity of a deed or contract; and it is always competent to show, by parol, that there has not been a delivery.

There can be no delivery without an acceptance by the party who is to receive the deed.

Where, in an action of ejectment, the defendants claim the right to the possession, under a written contract for the sale and conveyance of the premises to them by the plaintiff, evidence is admissible in behalf of the plaintiff, to show that the alleged contract was never delivered, but was placed in the hands of the defendants' agent, not as such agent, and not as a contract, but to be presented by him, in behalf of the plaintiff, to the defendants, as a proposition for their acceptance or refusal, and to be void as a proposition, unless the defendants should give notice to the plaintiff, of its acceptance, within a specified time; that such notice was not given; and that afterwards, and before any notice of acceptance, by the defendants, the plaintiff gave notice to the agent of the defendants, as such agent, that he withdrew the offer.

Under such circumstances, the paper will not bind the plaintiff, as a contract, until the defendants have accepted it; and until acceptance, the plaintiff may withdraw or rescind it.

And a declaration by the plaintiff, to the defendants, that he will not be bound by the proposition, made at any time before acceptance, will terminate it.

Where the execution of a paper by one party is completed by a delivery thereof to the agent of the other party, as a contract, parol evidence of conditions qualifying the delivery is not admissible; and the party signing the paper will be bound, although it is not signed by the other party.

THIS was an action of ejectment, brought to recover the possession of a strip of land, sixty-six feet wide, occupied by the defendants' rail road. The cause was tried before Justice Johnson, and a jury, at the Steuben circuit, in November, 1853, and a verdict was rendered in favor of the plaintiff. The defendants took exceptions to the rulings on the trial, and they, under an order of the court, were directed to be heard, in the first instance, at the general term. The plaintiff proved that the defendants were in possession of the premises in question. The defendants claimed the right to such possession under and by virtue of a written contract between the parties. This contract provided, first, for the conveyance of the premises in question to the defendants; and second, contained a "grant to the defendants, their successors and assigns, of permission to enter with their surveyors, agents, workmen and teams upon the premises for the purpose of surveying the route of the road and of building the same." This contract was signed, under seal, by the plaintiff and others, but did not appear to have been signed by the defendants. The contract provided for the conveyance of the premises in question, upon the payment of $600; such conveyance was to be made within a reasonable time after the location of the route of the road, and within sixty days from the commencement of the grading of the same, on the premises. The $600 were tendered within sixty days after the defendants began to work upon the premises, in constructing their road The plaintiff was permitted, on the trial, to show that the contract was delivered subject to certain parol conditions, and that before such conditions were complied with, the plaintiff notified the defendants that he would not be further bound by the in-

strument unless he was compelled by law to stand to it. The defendants objected to the introduction of all evidence tending to show that parol conditions accompanied the delivery of the contract. Such objections were overruled, and the defendants excepted.

*William Howell*, for the plaintiff. I. The title of the plaintiff is admitted by the pleadings, and the defendants admitted upon the trial that they were in possession of the premises in question. The plaintiff is therefore entitled to judgment, unless he has conveyed the property to the defendants or so far divested himself of his estate as to give to the defendants a right to the possession.

II. The instrument in writing, of the date of the 20th day of July, 1848, set out in the bill of exceptions, is but an agreement or contract to convey upon the terms specified therein, and not a deed or grant of the land. It provides for the future execution of a deed upon the performance of the conditions by the defendants. (*Ives* v. *Ives*, 13 *John.* 235. *Jackson* v. *Myers*, 3 *id.* 388. *Jackson* v. *Clark*, *Id.* 424.)

III. That agreement or contract was but a proposition or offer of terms of sale made by the plaintiff and the other parties to it, to the defendants for their acceptance, and the plaintiff had a right to retract or withdraw the offer at any time before it was accepted by the defendants, for until then no agreement existed between them. (*Chit. on Cont. 5th Amer. from 3d Lond. ed. p.* 13, *and cases there cited. Also p.* 9, *notes* 1, 2. *Reynolds* v. *Dunkirk and State Line Rail Road Co.*, 17 *Barb.* 613.)

IV. Parol evidence of the facts, circumstances and declarations of the parties, showing the terms and conditions upon which the agreement in question was placed in the hands of the agent of the defendants and the purposes for which it was done, the extent of his authority in respect of it, and the character of the possession of it by the defendants, was properly admitted by the judge as bearing upon the question of the delivery of the agreement to the defendants, and their acceptance of it. (10

*Wend.* 310. 23 *id.* 43. 1 *id.* 478.) Nor can authority to the contrary be found in the books.

V. There was no valid delivery of the agreement to Swain as a stranger, for the use or benefit of the defendants, for it was not so delivered by the makers, at the time, nor was it unconditional and absolute in terms, evincing an intention on their part to put it absolutely out of their own possession, power and control. (4 *Cruise's Dig.* 34, § 85. *Shep. Touch.* 57, 58. *Jackson* v. *Phipps*, 12 *John.* 418.)

VI. There was no valid delivery of the agreement to the defendants themselves, or to Swain as their agent, or acceptance by either. Swain refused to receive it when offered to him, and stated that he was not authorized to accept it. It was then placed in his hands, not as the agent of the defendants, but as the agent of the makers. Not by a formal delivery for the benefit or use of the defendants, as the act or deed of the makers, but for the only and especial purpose of submitting it to the defendants for their acceptance or refusal. The defendants did not accept it, but on the contrary gave notice to the plaintiff, in the month of March or April, 1851, (almost three years after it was sent to them) that they had not accepted it. Upon the receipt of that notice the plaintiff retracted and withdrew the proposition or agreement, and gave notice to the defendants to that effect. There can be no valid delivery of a deed unless it is the intention of the grantor to deliver it as his deed for the purpose of giving it effect as such, nor unless it is accepted as such. This agreement never had any legal operation or effect more than it would have had if it had always remained in the hands of the parties who executed it. (*Jackson* v. *Dunlap*, 1 *John. Cas.* 114. *Jackson* v. *Phipps*, 12 *John.* 418. *Jackson* v. *Bodle*, 20 *id.* 184. *Jackson* v. *Richards*, 6 *Cowen*, 617. *Jackson* v. *Perkins*, 2 *Wend.* 308. *Clark* v. *Gifford*, 10 *id.* 310. *Gilbert* v. *The North American Fire Insurance Co.*, 23 *id.* 43. *Reynolds* v. *The Dunkirk and State Line Rail Road Co.*, 17 *Barb.* 613. *Vassar* v. *Camp*, 1 *Kernan*, 441.)

VII. There was no error in the refusal of the judge to charge the jury as requested by the counsel for the defendants in his

second exception, or in the charge of the judge on that point, that the jury had a right to take into consideration whether there were parol conditions made at the time of the delivery, and if they found there were, then that such conditions were obligatory. (*Clark* v. *Gifford*, 10 *Wend.* 310, *and the other authorities cited to the 6th point.*)

VIII. There was no error in the refusal of the judge to charge the jury as requested by the counsel for the defendants in their third and fourth exceptions, or in that part of his charge in which he stated, "that the delivery of the contract to the agent was not conclusive as to that point, [i. e. the point in question;] that it was competent to show by parol evidence a conditional delivery, and for the jury to find from such evidence that the delivery was conditional. (10 *Wend.* 310, *above cited to last point, and the authorities above cited to the plaintiff's sixth point.*)

IX. There was no error in the refusal of the judge to charge the jury as stated in the 5th and 6th exceptions of the counsel for the defendants; there not having been any delivery of the agreement to either Swain as their agent, for he refused to accept it because he was not authorized to do so, or to the defendants for he was not authorized to deliver it to them, but only to submit it to them to accept or refuse it as a proposition, or if he was authorized to deliver it to the defendants, then because they refused to accept it; and parol evidence was competent to prove those facts, although the instrument was executed under seal, and a parol revocation of the proposition was effectual, (*See authorities cited to plaintiff's 6th point, and to his 2d point.*)

X. There is no error in the refusal of the judge to charge the jury as requested in the 7th and 8th exceptions, for the reasons mentioned in the last point and under the authorities there cited, nor in his refusal to charge as requested, as stated in the 9th and 10th exceptions, for the same reasons, and for the further reason that it did not appear that the defendants had located their road before the plaintiff retracted or withdrew his proposition.

XI. There was no error in the refusal of the judge to charge the jury as requested in the 11th exception; for the facts were

properly within the province of the jury, and of right submitted to them. (*Clark* v. *Gifford, supra.*)

XII. There is no error in the charge of the judge, as stated in the 12th and 13th exceptions, but it is fully sustained by the authorities cited to the foregoing points.

*John Ganson*, for the defendant. I. The contract having been executed by the plaintiff and his associates, under seal, and delivered to the defendants' agent, as such agent, parol evidence was inadmissible to qualify such delivery. (*Ward* v. *Lewis*, 4 *Pick.* 519. *Worrall* v. *Munn*, 1 *Seld.* 229, 238. 4 *Kent's Com.* 501, 7*th ed.* 3 *Barb. Ch. R.* 375. 6 *Paige*, 310. *Shepherd's Touch.* 59.)

II. The contract was binding, although it was not signed by the defendant. The contract had been acted upon by the defendant. It entered into possession of the premises under it, and located and constructed its road thereon.

III. The contract not only provided for a conveyance of the land, but granted the right to enter upon and *acquire an interest therein*, by the construction of the road. Such entry had been made and construction commenced, before the plaintiff intimated that he did not intend to perform the agreement.

IV. The contract secured to the defendant something more than a *license;* it granted a privilege to the "defendant, *its successors and assigns*," to build a road on the plaintiff's land for a *permanent* purpose. The defendant had expended money upon the faith of such grant, and the plaintiff could not, therefore, rescind it. (*Renick* v. *Kern*, 14 *Serg. & Rawle*, 267. *Mumford* v. *Whitney*, 15 *Wend.* 380. *Winter* v. *Brockwell*, 8 *East*, 308. 3 *Kent's Com.* 559. 11 *N. H. Rep.* 102.)

V. The charge at fol. 74 is wrong. The saying of the plaintiff, therein referred to, did not amount to a withdrawal of the proposition, if the instrument in question is to be treated simply as a proposition. (1 *Hill*, 572. 1 *Taunt.* 256.)

*By the Court*, T. R. Strong, J. Delivery is essential to the validity of a deed or contract; and it is always competent

to show by parol that there has not been a delivery. (*Roberts* v. *Jackson*, 1 *Wend.* 478. *Clark* v. *Gifford*, 10 *id.* 310. *Gilbert* v. *N. Amer. Fire Ins. Co.*, 23 *id.* 43. *The Lady Superior* v. *McNamara*, 3 *Barb. Ch. Rep.* 375.) There can be no delivery without an acceptance by the party who is to receive it. (*Jackson* v. *Phipps*, 12 *John.* 418. *Church* v. *Gilman*, 15 *Wend.* 656. *Crosby* v. *Hilyer*, 24 *Wend.* 280. *Jackson* v. *Bodle*, 20 *John.* 184. *Jackson* v. *Richards*, 6 *Cowen*, 617.) The proof on the part of the plaintiff, in avoidance of the defense set up, was therefore admissible. It goes to the point, that the paper purporting to be a contract for the sale of the premises in question to the defendants, was not delivered; that it was merely offered to the defendants, but the defendants did not accept it, and the offer was retracted. The proof is, in substance, that the paper was placed in the hands of the agent of the defendants, not as such agent, and not as a contract, but to be presented by him, in behalf of the plaintiff and his associates in the paper, to the defendants, as a proposition for their acceptance or refusal, and to be void as a proposition, unless the defendant should give notice to the plaintiff, of its acceptance, within a time specified; that such notice was not given within the time; and that afterwards and before any notice of acceptance by the defendants, the plaintiff gave notice to the agent of the defendants, as such agent, that he withdrew the offer.

There was no error in the instruction to the jury, that one question was whether the delivery of the paper was absolute, or as a proposition to be submitted to the directors of the defendants. The delivery referred to must be understood to be, having reference to the proof, the putting the paper in the hands of the person who received it, to submit for the plaintiff and the other persons whose names are subscribed to the paper, as a proposition to the directors. If the paper was handed to that person for the purpose mentioned, it would not, as the learned justice advised the jury in substance, bind the plaintiffs, as a contract, until the defendants accepted it; and until acceptance the plaintiffs might withdraw or rescind it. (*Vassar* v. *Camp* 1 *Kernan*, 441.) And a declaration by the plaintiff to the de

fendants, that he would not be bound by the proposition, made at any time before acceptance, would, as it was properly held, terminate it. (*Roberts* v. *Jackson*, 1 *Wend.* 478.)

So far as the learned justice refused to charge as requested, the points embraced in the requests, viewed in connection with the proof made, appear to be mostly, in substance, the negative of the instructions actually given, and I do not perceive that the refusal involves any error. In regard to the points not met by the charge, I think the requests were properly declined.

It is undoubtedly true that if the execution of the paper had been completed by a delivery to the agent of the defendants, as a contract, parol evidence of conditions qualifying the delivery would not have been admissible, and the plaintiff would have been bound, although the paper was not signed by the defendants. (*Worrall* v. *Munn*, 1 *Selden*, 229.) And the defendants having by a tender entitled themselves to a deed, might avail themselves of their equitable title as a defense to the action; (*Code*, §§ 150, 274;) and the contract could not be revoked. But these positions of the defendants are all dependent upon the delivery and complete execution of the paper as a contract.

In my opinion a new trial should be denied.

[Monroe General Term, Sept. 3, 1855. *Selden*, *Johnson* and *T. R. Strong*, Justices.]

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## Peabody and Riggs *vs.* The Washington County Mutual Insurance Company.

A policy of insurance is a contract of indemnity, and without an interest in the subject of insurance, at the time of the fire, the holder of the policy sustains no loss.

Hence an assignment of a policy as collateral security for the payment of a sum of money by the assignor, will not enable the assignee to maintain an action on the policy, in case of loss; where it does not appear from the complaint that he had, at the time of the fire, any interest in the property insured.

But where the assignor remains the owner of the property, until the time of the

fire, the whole loss is sustained by him. He continues the owner of the policy, subject to the title of the assignee to it for the payment of his debt, and, it not being available to the assignee, the assignor alone may recover upon it, to the extent of the loss.

Where a demurrer is to the whole complaint, if one of the plaintiffs might have judgment separately, it is bad.

A demurrer must be sustained or fail to the whole extent to which it is applied.

A demurrer will not lie for a misjoinder of parties.

The defect of parties for which a demurrer is allowed, under § 344 of the code, is a deficiency of, and not too many, parties.

THIS was an appeal from a judgment entered at a special term, upon demurrer to the complaint. The action was brought upon a policy of insurance for $875, issued by the defendants to C. D. Riggs, one of the plaintiffs, upon his dwelling house, household furniture, wearing apparel, grain and provisions therein. The policy was assigned by Riggs, May 20, 1850, to one Porter, as collateral security for $700; and Porter, on the 18th of September, 1850, assigned it with consent to the plaintiff Peabody, as collateral security for $400. The property was destroyed by fire on the 27th of October, 1852. Peabody furnished proof, &c. The complaint did not show that *Porter* or *Peabody* had any *interest* in the property insured, or that the debt for which the policy was assigned as collateral security was a lien on the property insured. The plaintiffs claimed that Peabody's interest was $400, and that the residue *equitably* belonged to *Riggs*. The defendants demurred, 1st, for defect of parties plaintiffs, and 2d, because the complaint did not state facts sufficient to constitute a cause of action. Under the first point it was urged that there was nothing to show that the plaintiffs had a joint interest; and under the second, it was insisted that it did not appear that Peabody was interested in the subject of the insurance. Judgment was given for the plaintiffs, at the special term, with leave to the defendants to answer on payment of costs. The defendants appealed.

*J. C. Hopkins*, for the appellants.

*J. Dorr*, for the respondents.

*By the Court*, T. R. STRONG, J. The plaintiff Peabody, according to the allegations in the complaint, under assignments of the policy of insurance, made with the consent of the defendants, and by virtue of an understanding with the plaintiff Riggs, to whom the policy was issued—all of which took place before the loss—holds the policy as collateral security for the payment to him by Riggs of $400. But it does not appear by the complaint that he had at any time any interest in the property insured, and this is fatal to his right to recover. A policy is a contract of indemnity, and without an interest in the subject of insurance, at the time of the fire, the holder of the policy sustains no loss. (*Murdock* v. *Chenango Co. Mutual Ins. Co.*, 2 *Comst.* 210, 216.) In *Marshall on Insurance*, (1*st Am. ed.*) 696, it is said "the mere assignment of the policy would be of little avail, without an assignment of the subject matter of the insurance also." The assignee could derive no benefit from the policy, unless the interest of the assured were transferred with it; because, as we have already shown, the insured must not only have an interest in the subject matter of the insurance, at the time of insuring, but also at the time the loss happens. (3 *Kent's Com.* 371, 375, 4*th ed.*) The difficulty in the way of a recovery by the assignee is not in the policy, or assignment, but that he has not been damnified. (*Howard* v. *The Albany Ins. Co.*, 3 *Denio*, 301, 303.) This interest must be stated in the complaint, as well as the fire and other necessary facts, to make out a cause of action. (*Granger* v. *Howard Ins. Co.*, 5 *Wend.* 202.)

But I think the complaint discloses a good cause of action in favor of the plaintiff Riggs. The only objection to his right to recover, regarding him as sole plaintiff, which is indicated on the part of the defendants, is founded upon the allegations of the assignments of, and the right of Peabody to, the policy. This objection cannot prevail, for the reason that the assignments, and the right of Peabody, are merely as collateral security for a debt due from Riggs, and Peabody cannot, upon the facts stated, maintain an action on the policy. It must be

understood, in the absence of any thing appearing to the contrary, that Riggs remained the owner of the property at the time of the fire; the whole loss therefore was sustained by him. He continues the owner of the policy, subject to the title of Peabody to it for the payment of his debt, and, as it is not available to the latter, he alone may recover upon it to the extent of the loss. The liability of the defendants, on their contract, to some one, is not affected by the assignment, and as they are not liable to the plaintiffs or to Peabody alone, they are so to Riggs. It is of no moment whether his interest is legal or equitable, as he only is entitled to recover.

The demurrer was rightly overruled, unless judgment for or against the plaintiffs jointly, only, could properly be rendered. As it is to the whole complaint, if one of the plaintiffs might have judgment separately, it is bad. A demurrer must be sustained or fail to the whole extent to which it is applied. (1 *Chit. Pl.* 576, 7, *Phil. ed. of* 1828.) By § 274 of the code, "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." Under the authority of this provision, I do not perceive any difficulty in giving judgment for one of the plaintiffs and against the other. The object of the provision was to abrogate the common law rule which the defendants now seek to have enforced, and to enable the court to award justice according to the rights of the parties. (*Brumskill* v. *James*, 1 *Kern.* 294.)

Another ground on which the decision on the demurrer was right—the complaint presenting a cause of action in favor of one of the plaintiffs—is, that a demurrer will not lie for a *misjoinder* of parties. The defect of parties for which a demurrer is allowed under § 344 of the code, is a deficiency of, and not too many, parties. Upon the opposite construction, the whole beneficial purpose of § 274 might be entirely defeated in many cases, unless the court should hold that under the code a demurrer may be sustained in part only.

The proper course for the plaintiffs to pursue in this case on the decision of the demurrer, after the expiration of the time

allowed to answer, was to ask leave of the court to enter judgment in favor of the plaintiff entitled to judgment, and to dismiss the complaint as to the other plaitiff.

The judgment must be affirmed as to Riggs, and reversed as to Peabody; neither party to be allowed costs of the appeal. (*Code*, § 306.)

[Monroe General Term, September 3, 1855. *Selden*, *Johnson* and *T. R. Strong*, Justices.]

## Elton *vs.* Markham.

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A single exception to a series of decisions, one of which decisions is correct, is unavailing.

A complaint alleged that the plaintiff, on or about the 31st day of May, 1851, was lawfully possessed, as of his own property, of one large gold English lever watch of the value, &c., and that the plaintiff, on or about the time above stated, did lend said watch, without any consideration therefor, to the defendant, for the space of four days, with the promise on the part of the defendant that within that time said watch should be returned to the plaintiff, its rightful owner. It then charged that the defendant knew the watch was the property of the plaintiff, and that with intent to defraud &c., he had not delivered it to the plaintiff, &c., but had "converted and disposed of it to the defendant's use," &c.

*Held*, 1. That the allegation that the watch was lent to the defendant, by the plaintiff, although not necessary to be made, in that form, was a material allegation, for the purpose of connecting the defendant with the property, so as to lay a foundation for the allegation of a refusal to deliver it, on request, and of a conversion; and was issuable.

2. That a denial, in the answer, that the plaintiff, "on or about the 31st day of May, 1851, did leave such watch as aforesaid with the defendant, for any period, with the promise of this defendant to return the same to the plaintiff," was bad pleading, in form; it being a negative pregnant; but that it controverted the allegation as to the lending of the watch to him, and put it in issue, within the meaning of § 168 of the code. That it was an informal denial, and unless objection was made, for defect of form, before trial, it would be waived, and each allegation would be regarded as controverted.

3 That an allegation, in the answer, that the defendant was "not informed" and could "not state," whether the plaintiff was, at the time stated in the com-

plaint, possessed as of his own property, of the watch, was not warranted by the code.

4. That a denial of all fraudulent intent on the part of of the defendant, "or any unlawful conversion of said watch to his own use," formed no material issue in respect to the intent; and that the denial of any unlawful conversion was not intended to controvert that the defendant actually converted and disposed of the property to his own use, but simply the unlawfulness of what he did.

5. That an averment, in the answer, of a sale and delivery of the watch to the defendant was not inconsistent with the allegation in the complaint, of a bailment, and therefore a denial of it; it not appearing, on the face of the pleadings, that the sale was not subsequent to the bailment.

A denial, in an answer, must be general or specific, or it must be of any knowledge or information, &c., sufficient to form a belief.

APPEAL, by the plaintiff, from a judgment entered at a special term of the court, after a trial at the circuit. The complaint was as follows: "Nathaniel Elton, the plaintiff in this action, complains of Thomas Markham, the defendant, for that the said plaintiff on or about the 31st day of May, 1851, was lawfully possessed as of his own property, of one large gold English lever watch, of the value of one hundred and twenty-five dollars, and that the said plaintiff, on or about the time above stated, in the town of Perinton, county of Monroe, did lend said watch, without any consideration therefor, to the defendant in this action, for the space of four days, with the promise on the part of the defendant, that within that time said watch should be returned to the plaintiff, its rightful owner, and that the defendant well knew that said watch was the property of and belonged to the plaintiff, but fraudulently intending to defraud and deceive the said plaintiff, has not delivered said watch to the plaintiff, although often requested so to do, but has converted and disposed of said property to his own use, to the damage of the plaintiff of one hundred and fifty dollars; wherefore the above named plaintiff demands judgment against the above named defendant for the sum of one hundred and fifty dollars, besides costs."

The defendant put in the following answer: "The defendant for answer to the complaint of the plaintiff, says that he is not informed and cannot state whether the plaintiff, on or about the 31st day of May, 1851, was possessed as of his own prop

erty of one large gold English watch. And the defendant further answering specifically denies that the plaintiff, on or about the 31st day of May, 1851, did leave such watch as aforesaid, with the defendant in this action for any period, with the promise of this defendant to return the same to the plaintiff. And the defendant denies all fraudulent intent on his part toward the plaintiff, or any unlawful conversion of said watch to his own use. The defendant further answering, says that the plaintiff, on or about the 31st day of May, 1851, at the place in said complaint mentioned, for a full consideration, agreed to be paid by the defendant to the plaintiff, sold and delivered the said watch to the defendant."

The plaintiff replied, denying that on or about the 31st day of May, 1851, or at any other time, for a full consideration, or for any consideration, agreed to be paid by the defendant, the plaintiff sold the watch mentioned, to the defendant; but that the defendant wrongfully and unlawfully converted the same, while it was the property of the plaintiff. On the trial, at the Ontario circuit, before Justice Taylor and a jury, the plaintiff gave no evidence, but relied upon the pleadings to recover, claiming that no material allegation of the complaint was denied by the answer, so as to require proof from the plaintiff to entitle him to recover, &c., and requested the court so to hold. The court refused, and held that each allegation was sufficiently denied to require proof of the same, by the plaintiff; to which ruling the plaintiff by his counsel excepted.

The jury found a verdict for the defendant; and a motion having been made, at a special term, for a new trial, upon exceptions, the same was denied.

*S. V. R. Mallory*, for the plaintiff.

*J. C. Smith*, for the defendant.

*By the Court*, T. R. Strong, J. It was insisted on the part of the plaintiff at the trial, that none of the material allegations in the complaint were controverted by the answer

and that all of them must, therefore, under section 163 of the code, for the purposes of the action, be taken as true; hence that upon the complaint and answer the plaintiff was entitled to a verdict; and the justice was requested by the plaintiff's counsel so to decide. The justice refused thus to decide; but on the contrary decided, that said allegations were, and that each of them was sufficiently denied to put the plaintiff to the proof thereof, and that without proof of the said allegations, and each of them, the plaintiff could not recover. An exception was taken on the part of the plaintiff, to the refusal of the justice "to decide and hold as requested, and to the decision and ruling of the said justice as above stated." It is manifest, that the refusal to decide, in accordance with the proposition submitted—that every thing material in the complaint was admitted, and that the plaintiff was entitled to a verdict—is substantially different from the decision thereupon made—that each material allegation must be proved, in order to maintain the action. The refusal was correct, if proof of any one of the allegations was necessary to entitle the plaintiff to a verdict; the decision following it was erroneous, unless proof of all that are material was necessary. But as the exception is single—embracing both the refusal and the subsequent decision—unless both were erroneous, the exception must fail. In *Jones* v. *Osgood*, (2 *Selden*, 233,) it was held that "a general exception to a charge and every part of it, when the charge involves more than a single proposition of law, and is not in all respects erroneous, presents no question for review upon appeal." The same doctrine is reiterated in *Caldwell* v. *Murphy*, (1 *Kernan*, 416;) and it is said in that case, in reference to a similar exception: "This has so often been held insufficient, that no further remark respecting it is now necessary." Clearly, upon the same principle, a single exception to a series of decisions, one of which is correct, is unavailing.

The complaint is substantially, that the plaintiff, "on or about the 31st day of May, 1851, was lawfully possessed as of his own property, of one large gold English lever watch," stating its value, "and that the said plaintiff, on or about the time above

stated, &c., "did lend said watch, without any consideration therefor, to the defendant in this action, for the space of four days, with the promise, on the part of the defendant, that within that time said watch should be returned to the plaintiff, its rightful owner;" it is then charged that the defendant knew the watch was the property of the plaintiff, and that with intent to defraud, &c., he has not delivered it to the plaintiff, although often requested, but has "converted and disposed of it to the defendant's use," to the plaintiff's damage of $150; and judgment is demanded for that sum, with costs.

It does not appear by the complaint, that the watch ever came into the possession, or under the control of the defendant, except by the allegation that it was lent to him by the plaintiff. That allegation is therefore a material one. It was not necessary to make it; a general allegation that the defendant had the watch in his possession, without stating how he acquired it, would have been sufficient to connect the defendant with the property; but it was necessary to connect the defendant with it in some way, to lay a foundation for the allegation of a refusal to deliver it to the plaintiff on request, and of a conversion; and the plaintiff having chosen to do it in the mode adopted, and in no other mode, the allegation employed for the purpose is an issuable allegation.

The third paragraph of the answer is in these words: "And the defendant further answering, specifically denies that the plaintiff, on or about the 31st day of May, 1851, did leave such watch as aforesaid with the defendant in this action, for any period, with the promise of this defendant to return the same to the plaintiff." This is bad pleading in form; it is a negative pregnant; the denial may be strictly true, and yet only the time stated in that part of the complaint to which it is intended to apply—which is wholly immaterial—be wrong. But this form of pleading was formerly, when a general demurrer would lie for defects in substance, and a special demurrer was required for formal defects, only the subject of a special demurrer; and unless demurred to specially, it put every thing material to which it applied in issue. (*Gould's Pl. ch.* 6, *part*

1, § 29 *to* 36. *Bac. Ab. tit. Pleas and Pleadings*, 6.) Although still objectionable, it cannot, I think, be said that it does not controvert the allegation to which it relates, within the meaning of section 168 of the code. It is an informal denial, and unless objection is made for defect of form, before the trial, it will be waived, and each allegation will be regarded as controverted. One mode of objecting to such a defect is, I think, by motion, under section 160 of the code, the last clause of which provides that "when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." Whether that is the only mode, it is not necessary now to decide.

Overlooking the defect of form, which has been considered, I think the portion of the answer above given, substantially controverts the allegation in the complaint, of the lending of the watch to the defendant. Webster's definition of the word "lend" is, "1. To grant to another for temporary use, on the express or implied condition that the thing shall be returned, as to lend a book." A "loan for use" is defined by writers on the law of bailment to be "a bailment of goods to be used by the bailee temporarily, or for a certain time, without reward." (*Story on Bailment*, § 6, 219, 220.) Thus understanding the term "lend" in the complaint, the delivery of the watch to the defendant, and his promise to return it, are included in the allegation that the plaintiff lent the watch to the defendant. The answer, instead of a literal denial, negativing the allegation in the words of it, denies that the plaintiff did leave the watch with the defendant for any period, with his promise to return it. This meets the substance of the allegation, and puts it in issue.

The first paragraph in the answer is, that the defendant "is not informed and cannot state," whether the plaintiff was, at the time stated in the complaint, possessed as of his own property of the watch. The code does not warrant this form of denial. A denial must be general or specific, or it must be

"of any knowledge or information, &c. sufficient to form a belief." The third paragraph denies all fraudulent intent on the part of the defendant, "or any ulawful conversion of said watch to his own use." The denial of the intent forms no material issue; and the denial of any unlawful conversion was not intended to controvert that the defendant actually converted and disposed of the property to his own use, but simply the unlawfulness of what he did. This is apparent from the fourth and last paragraph of the answer, which is, that the "plaintiff, on or about the 31st day of May, 1851, &c., sold and delivered the said watch to the defendant." And the whole answer must be regarded in giving a construction to any part of it. The answer does not purport to, and does not in fact, set up separate defenses. The several denials and the new matter are designed to aid and support each other.

It is contended on the part of the plaintiff, that the concluding part of the answer, alleging a sale and purchase, is inconsistent with the allegation in the complaint, of a bailment, and therefore a denial of it. If the supposed inconsistency existed, without some further denial, no proof of the bailment would have been requisite on the part of the plaintiff in the first instance; he would have been entitled to recover, unless the defendant established the new matter of a sale and purchase, brought forward by him in his defense; the burden of proof as to which was upon him. But the complaint and answer, in the respect alluded to, are not necessarily inconsistent. For ought that appears on the face of the pleadings, the sale was subsequent to the bailment.

There being one material issue formed by the mere denials in the answer, the exception taken must be overruled, and the judgment affirmed.

[Monroe General Term, September 3, 1855. *Selden*, *Welles* and *T. R Strong*, Justices.]

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9h 689
29h 533
1h 406
0h 563
4a 465
0a 355
3a 61

## Foster *vs.* Pettibone.

Trespass cannot be maintained by the owner of goods, against a sheriff, for taking them under and pursuant to a writ of replevin against another person having the goods in possession. Johnson, J., dissented

The law fully recognizes the owner's right, and if he can, without force, obtain the property, will not hold him a wrongdoer for taking it; but it withholds from him an affirmative remedy by action against a ministerial officer; allowing him an action only against other persons concerned in, or who instigated, the taking.

APPEAL by the plaintiff, from a judgment entered at a special term, upon the report of a referee. The action was trespass for taking a quantity of flour. The referee nonsuited the plaintiff, on the ground that the defendant having acted in the premises by the command of a writ of replevin, was justified thereby, and was not liable to the plaintiff in this action. The opinion of the court states all the facts that are material.

*John N. Pomeroy*, for the appellant. I. An action of trespass can be maintained by the plaintiff against the defendant, for taking the property of the plaintiff upon the writ of replevin, issued in the suit against David S. Baker. It is a general principle of the law, that the owner of property is protected from intrusions upon it by third persons. He is entitled to its unmolested possession, enjoyment and disposition, and any one undertaking to exercise control or dominion over it, whether he be an officer, or other person, acts at his own peril. The law gives the owner of chattels a remedy by action against a trespasser, or he may retake them, peaceably, without process. These are general and elementary principles, and unless the defendant is protected by other rules of law, he must be answerable to the plaintiff for his trespass. We will inquire whether he is thus protected. (1.) The defendant is not protected by the rule that ministerial officers may justify acts done under process regular on its face. This principle is a familiar one, but it does not apply to the case presented in this action. The plaintiff in the replevin suit, and all other persons engaged in the taking, except the sheriff, are confessedly liable in an action of trespass, to the

owner of the goods. (*Shipman* v. *Clark*, 4 *Denio*, 446.) It is a common principle that the sheriff is liable to the owner of goods taken under execution, regular on its face, issued in an action against a third person, directing the officer to take the chattels of such defendant. There can be no true distinction made between the case of a sheriff taking a stranger's goods under an execution and under a writ of replevin. This distinction has been raised, and relied on, and is the gist of all reasoning against the liability of the sheriff. In the case of *Shipman* v. *Clark*, (4 *Denio*, 446,) Bronson, J., very cautiously says, "But in replevin, when the command of the writ is to replevy and deliver certain specified chattels, the process *may be* a sufficient protection to the officer, though he take the chattels from the possession and they be the property of one who is a stranger to the writ," and cites *Hallet* v. *Byrt*, (*Carthew*, 380.) These cases are all that can be found in the reports upon this point. It is only necessary to say of these opinions that they are entirely obiter. Judge Bronson's dictum was only intended to be obiter, and is placed by the reporter under a semble. The case in Carthew called for no such line of observation as the judge adopted, and he argued entirely upon a hypothetical state of facts. The case involved two questions, (1.) whether the plea gave color, and (2.) whether the custom pleaded was legal, and both were negatived. These cases then have no binding authority as precedents. But we deny upon general principles, that the distinction they attempted to raise is a sound one. An execution directs the sheriff to levy upon and sell the goods and chattels which are *the property of the defendants*. It does not specify any particular goods and chattels, but the force of the writ is the same as though a general inventory should be incorporated into it, purporting to give a schedule of the goods which were the property of the defendant. The case states that the writ of replevin, "directed the defendant in this action [the sheriff,] to take the said goods and chattels as the property of the said John G. Brown," who was made plaintiff in the replevin suit. Now, unlike the writ of execution, which is against all the property generally of a defendant, the writ of replevin

limits the sheriff to take *particular goods as the property of the plaintiff in the replevin suit.* The goods to be replevied are inventoried or specified, but still have upon them the limitation of being the property of the plaintiff in the replevin suit, and the sheriff is bound by two restrictions, viz: he must take only the goods pointed out, and those goods must be the property of the person suing out the writ of replevin. Under an execution the goods are not specified; the sheriff has, as it were, a general inventory to choose from, but he is also under the limitation of the goods being the property of a particular person, viz: of the defendant in the execution. If a sheriff in executing a writ of execution, seizes goods which are the property of a stranger, he oversteps the limits of his authority, and invades the rights of that third party. If the sheriff, in executing the writ of replevin, seizes either any goods not specified, or any of the goods which are specified, and which are the property of a stranger, he also oversteps the limits of his authority, and invades the rights of that third party. It is conceded that the sheriff is liable in the former case, and we are able to see no distinction between the two, to relieve him from liability in the latter.

II. The sheriff is not protected by the provisions of the statute directing replevins, if he seizes the property of a stranger to the replevin suit. The referee, in deciding the motion for a nonsuit, relied entirely upon the statute, and it may be well to examine its provisions. The revised statutes, tit. 12, ch. 8, part 3, relate to replevins. The first seven sections regulate the commencement of suit, the 8th directs the sheriff to execute the writ, the 13th to 17th relate to conflicting claims of property. The 13th section provides, that "If the defendant, or any other person, who may be in possession of the goods and chattels specified in the writ, shall claim property therein, or in any part thereof," they may procure a jury to be summoned by the sheriff, to try the claim. The 14th and 15th sections relate to proceedings before the jury. By the 16th the sheriff is directed to deliver the goods to the plaintiff in the replevin, if the jury shall find that the property is not in the claimant, and by the 17th

the sheriff "shall not deliver the same unless the plaintiff shall indemnify the sheriff," when the jury shall find that the property is in the claimant. These are all the provisions in regard to conflicting claims. (1.) Under these sections the present plaintiff was not empowered to interfere and claim the property seized by the sheriff. The referee says in his opinion, that "it was clearly competent for the defendant in the replevin, or the plaintiff in this action to have interposed his claim to the property;" and "It is difficult to see how he [the sheriff] can be made liable in case where no claim whatever has been interposed, where he has no indemnity, and no right to exact any." The error into which the referee fell, was in assuming that the plaintiff could interpose his claim of property. The statute nowhere authorizes him to do so. That privilege is given to the defendant in the replevin suit, and to any other person who may be in possession of the chattels specified in the writ. The whole tenor of the statute shows that the possession intended is an actual possession. In this case the owner of the property was neither the defendant in the replevin suit, nor was he in possession of the property, and the statute makes no provision for him. In the case of *Stimpson* v. *Reynolds*, (14 *Barb.* 510,) a case very similar to the present one, Judge Wright, in giving the opinion of the court, says, "It is argued that the plaintiff in this case might have put in a claim of property, or have prosecuted the plaintiff in the writ of replevin, in trespass or trover. But could he have put in a claim under the statute? He was neither a defendant in the replevin suit, nor was he in possession of the goods, and these are the only persons that by the statute may interpose the claim." The code has altered the law in regard to the claims of third persons in replevins, and has largely extended the right to interpose the claim. (*Code*, § 216.) (2.) But if the plaintiff was empowered to interpose his claim to the property, and to demand a sheriff's jury to try the title to the property, his neglect to do so does not prevent him from resorting to any other legal remedy. (3.) The sheriff is not bound to execute the writ absolutely, and without remedy or protection. The referee in his opinion assumes and proceeds entirely upon the

idea that the sheriff can require no indemnity, and must absolutely take possession of the goods as directed by the writ, and that he cannot be liable for acts which the statute directed him to do, without any opportunity of his procuring security for himself. The sheriff is nowhere bound to seize the goods if he has reason to suppose that they are the property of another. He may in all cases protect himself by calling a sheriff's jury to try the title of property against which process is issued. We esteem this to be a common law right of sheriffs, and at all events it is their practice. But are not sheriffs protected by the bonds they were required to take under the provisions of the revised statutes? Such bonds were executed to the sheriff, with securities to be approved by him, and conditioned that the plaintiff would prosecute the suit to effect without delay, and would return the property, if return thereof was adjudged, and would pay to the defendant such sums of money as should be recovered against him for any cause whatever. It seems to us that the provisions of this bond enure to the benefit of the sheriff, and that he is protected, or can protect himself under it. This defendant cannot complain that he is bound without any remedy or security to execute this writ, and that he should not be liable for his trespasses done in obeying the statute, for we have seen that he may protect himself by a jury, and that he always takes a bond, by virtue of which he may indemnify himself for his acts. (4.) If this plaintiff cannot maintain this action he is remediless. That the plaintiff's rights have been invaded, there can be no question, and the law will certainly give him a relief. The plaintiff was not made a party in the original replevin suit, and had no power to appear in it. He had no right under the statute to appear before the sheriff and interfere—the goods were not in his possession—they were seized in a proceeding to which he was a stranger, and of which he was entirely ignorant, and it is a mockery to say that he cannot claim reparation from the parties doing the wrong. The person suing out the replevin writ may be entirely irresponsible, and if the rule claimed on the part of the defendant be the true one, the plaintiff must lose his property.

III. This plaintiff might have peaceably retaken the flour replevied, while in the hands of the sheriff or of the plaintiff to whom the sheriff had delivered it, without process, and he may enforce the same right, if need be, by action. It is, without question, true that an action confers no new rights upon a party; it is only a method of enforcing through the means of a court, rights which before existed. And it is also true, as a general rule, that when a party has a right he shall have the power to enforce it. It can hardly, then, be denied, that if the party plaintiff could retake the replevied goods peaceably from the possession of the sheriff, he can also have an action of trespass against the sheriff for taking the same goods. The action does not increase or add to the plaintiff's right to the goods: it is only a means of vindicating or enforcing that right, and the right to the action logically follows the right to the property. If the plaintiff may retake the goods from the sheriff's hands, it is because that officer has no lawful claim upon them, and no power to keep them, and therefore is a trespasser from the beginning in taking them, and if a trespasser, then liable to this action for trespass. It would be absurd and self-contradictory to allow the right to the plaintiff to retake the goods, and deny him the privilege of bringing an action for the original seizure. Can the owner then retake the property peaceably from the hands of the sheriff without process? We answer that he can, and for the following reasons: (1.) Upon the general principles of the rights accruing to the ownership of property, when that ownership has been violated. (2.) The objection that the writ of replevin is issued upon proof made, as to the property, and in a quasi judicial proceeding, can have no foundation upon the general principles of law, for the real owner was not at all a party to this proceeding, and is not, then, in the least concluded or affected by this proceeding, and would not be, even were it a solemn judgment of a court. This is one of the most elementary principles of law. (3.) The statute forbidding counter replevins, which is but declaratory of the common law, is only intended to prevent the defendant in the replevin suit from resorting to the same process, when he can have all matters

adjusted in the original suit, and does not affect the rights of third parties, strangers to the suit, who may be owners of the property. (4.) The rights of the sheriff are no more than those of the plaintiff in the replevin suit, and the owner of the goods would have the same claim against the goods in the hands of either. In the case of *Spencer* v. *McGowan*, (13 *Wend.* 256,) it is decided that the owner of personal property, left in the possession of a third person, may, by his own act, repossess himself of such property, although it be taken from the possession of such third person by virtue of a writ of replevin. This case virtually decides the right of the owner of replevied property to retake it, in whosever hands it may be, if he can do it peaceably, and if he may do this, his right to an action is clear.

IV. The only case in point upon this question, in the English or American reports, maintains the rights of this plaintiff against the sheriff in their fullest extent. The cases already cited from Carthew and Denio are all that we have been able to find, after very careful search, with the exception of the case lately decided of *Stimpson* v. *Reynolds*, (14 *Barb.* 506) In this case, flour, which was the property of the plaintiff, had been taken by the sheriff under a writ of replevin, issued in a suit in which third parties were plaintiffs, and the warehouse keeper, in which the flour was stored, was defendant. The owner brought trover against the sheriff. A referee decided in favor of the owner, against the sheriff, and the defendant appealed to the general term, Wright, Harris and Parker, Js. Mr. Justice Wright delivered the opinion of the court, affirming the judgment, and he assumed that the case involved just the question presented by this action, and discussed that question, and decided that question. The broad doctrine was laid down that the sheriff was liable in an action by the owner of the property taken under a writ of replevin issued in the suit of a third person. This case controls and governs the decision of the present question, and has no decision opposed to it, and unless this court expressly overrules it, they must reverse the judgment below, and order a new trial.

*Geo. Rathbun*, for the respondent. The act for which the defendant was sued in this case, was: (1.) An official act as sheriff. (2.) It was done in obedience to the positive directions and requirements of the statute. (3.) The law left to the defendant no option, or discretion, in any respect. (4.) He was compelled by law not only to do the act complained of, but to do it precisely as he did. He is, therefore, protected by his office and writ, as held by the referee. The non suit was right. (*Shipman* v. *Clark*, 4 *Denio*, 446. *Hallet* v. *Byrt*, *Carthew*, 380. *Savacool* v. *Boughton*, 5 *Wend.* 170. 2 *R. S.* 523, § 6, *&c.*) The case of *Stimpson* v. *Reynolds*, (14 *Barb.* 506,) was a mere dictum. The case turned upon the point that it was not proved that the sheriff took the identical property described in the writ. It could not, therefore, protect him. The opinion of Mr. Justice Wright, is his individual opinion, and not the judgment of the court.

T. R. Strong, J. This is an action of trespass, commenced before the code, for the taking by the defendant, of a quantity of flour, the property of the plaintiff. The defendant, at the time of the taking, was sheriff of the county of Cayuga, and took the flour from the possession of one Baker, under and by virtue of a writ of replevin, issued in a suit in favor of one Brown against Baker, directed to him, and requiring him to take the property. The writ is not set forth in the case, but it is stated that it required the defendant to take the flour, "as the property of the said John G. Brown." I understand from this statement of the writ, not that the command was in those words, but that the writ recited, in the ordinary form, a complaint by the plaintiff therein, of the taking of his flour, describing it, and then commanded the sheriff, if security should be given &c., to cause the same flour to be replevied. (2 *R. S.* 523, § 6. *Yates' Pl.* 539.) It is not material, however, in which of these forms the requirement to take the property was, as there is not, in my opinion, any substantial difference between them. The question in the case to be decided is, whether the present defendant is liable as a trespasser, to the present plaintiff,

the owner of the flour, for taking it as sheriff in obedience to the writ; or in other words whether trespass can be maintained by the owner of goods against a sheriff, for taking them under and pursuant to a writ of replevin against another person having the goods in possession.

In *Hallett* v. *Byrt*, (*Carthew*, 380,) which was an action of trespass for taking three cows, the defendant pleaded specially, setting up a justification under a precept in replevin. The plaintiff demurred, assigning for cause, that the plea amounted to the general issue, and the demurrer was sustained for the reason stated, and also because a prescription relied upon in the plea as authorizing the process of replevin was void. In respect to the first cause, Holt, Ch. J., said, "If the defendants had admitted a bare possession &c., that would have been a sufficient color for the defendants to justify specially under the precept for replevin, because the cows were especially mentioned in the precept, and they were commanded to take them, and therefore they might justify the taking &c., although the property was not in that person who brought the replevin. And no action of trespass will lie against the defendants (the officers) for taking goods or chattels, by virtue of a replevin, unless he who hath possession claims a property when the officers come to demand them, and they take them notwithstanding such claim of property, and this special matter must come in by way of replication by the plaintiffs. And so there is a difference between a replevin and other process of law, with respect to the officers, for in the first case, viz: in the replevin, they are expressly commanded to take that in specie, but in writs of execution the words are general, viz: to levy of the goods of the party, and therefore it is at their peril if they take another man's goods, for in that case an action of trespass will lie." In *Shipman* v. *Clark*, (4 *Denio*, 446,) which was an action of trespass for taking timber &c., the defense at the trial was, that the timber was taken under a writ of replevin in favor of Clark against one Scott, and delivered by the sheriff to Clark, &c. who drew it away. Bronson, Ch. J., says: "On an execution against the goods of A. the officer acts at his peril if he

takes the goods of B. But in replevin, where the command of the writ is to replevy and deliver certain specified chattels, the process may be a sufficient protection to the officer, though he take the chattels from the possession, and they be the property of one who is a stranger to the writ. (*Hallett* v. *Byrt*, *Carthew*, 380.) But in such a case, the process can be no justification to the plaintiff in the replevin, or to those who act under his authority, in removing the goods. It would be strange indeed, if a man could sue out a writ against A. and take the goods of B. with impunity. The person whose goods are taken is not confined to a claim of property before the sheriff, but may have the usual remedy by action, or retake the goods without process if he can do it peaceably. (*Spencer* v. *McGowan*, 13 *Wend.* 256.) In *Stimpson* v. *Reynolds*, (14 *Barb.* 506,) which was an action of trover for flour, and the defense was that it was taken by the defendant as sheriff, under a writ of replevin, the court refused to set aside a report of a referee in favor of the plaintiff, on the ground that it did not appear that the property taken was the identical property described in the writ, and also expressed the opinion after a brief discussion of the point, that if it had been made to appear, the defendant would not "have been shielded or protected by the process in taking the property of the plaintiff, who was in no way a party to the action."

No other case has been cited by the counsel, or has come to my notice, in which the question now presented has arisen. The counsel for the plaintiff, in his elaborate and learned printed argument, and Justice Wright in *Stimpson* v. *Reynolds*, say there is no other case on the point, in the books. It will be observed, that it was not necessary to pass upon the question in either of the cases referred to. The question is therefore entirely open, in respect to authority.

It is a consideration entitled to no small weight against the right of action, that often as property has been seized under a writ of replevin issued therefor which belonged to, or was claimed by, some other person than the parties, no case can be found in which a recovery against the officer who served the

writ, as a wrongdoer, has been permitted. The fact is a striking testimony to the prevalence of an opinion among the profession, ever since the action of replevin has existed, that no liability is incurred by the officer by acts done by him in obedience to the process.

There would be a flagrant inconsistency, in holding that an officer of the law may be liable in tort, for taking property which by law he was commanded to take, when he kept strictly within the limits of his process, in compelling the commission of a wrong and enforcing a responsibility for it; but I do not see why this doctrine would not be involved in the maintenance of the action. The property taken was specified in the writ; the writ contained a command to take it, which was absolute and unqualified; no direction was given to the sheriff to inquire into the right of property before seizure; no means are provided by the statute for such an inquiry, except on a claim of property being interposed; and I know of no authority for such a proceeding in any other case. The proceedings in the action of replevin, are almost wholly regulated by statute, and if such an authority in the sheriff had been contemplated by the legislature, some reference would have been made to it, in the form prescribed for the writ, or in some provision for the exercise of the authority. Not only is there no such provision, but the statute in terms commands the sheriff, upon the receipt of the writ with the affidavits and bond, to "forthwith proceed to execute the writ, by delivering possession of the property named therein to the plaintiff," &c. There is no force in the position that the command in the writ is limited to the property of the plaintiff therein, by the direction to take it as his property. An affidavit of property was required, to authorize the writ, and the plaintiff had by compliance with the law, entitled himself to have the specific property, before the officer of the law was called upon to execute the process. The sheriff was to take the goods as the property of the plaintiff; whether they were in fact the plaintiff's, or not, he was not to inquire. That question had been determined, so far as the issuing and execution of the writ was concerned.

It is a familiar principle, sustained by numerous authorities

that process from a court or officer having jurisdiction to issue such process, which is regular on its face, is a perfect protection to a ministerial officer, for acts done in obedience to it. (*Savacool* v. *Boughton*, 5 *Wend.* 170. *Sheldon* v. *Van Buskirk*, 2 *Comstock*, 473, 477.) This principle appears to be decisive of the question under consideration. Viewing the mandate of the writ as imperative and unconditional, the strongest considerations upon which the principle referred to, of protection to ministerial officers, can rest in any case, exist and require protection to the defendant in this. It would be intolerable to require the sheriff to act, and hold him responsible for his action, to a third person who might prove to be the owner of the property. But whether the sheriff might or not, inquire into the title to the property of the plaintiff in the writ of replevin, and justify himself for declining to execute the writ, by showing that the plaintiff was not the owner, he was not bound to take that burthen and responsibility upon himself, but might obey the writ and rely upon that for his protection.

The distinction, in reference to the principle referred to, between an execution which goes against the property generally of the defendant, without specifying any particular property, and a writ of replevin, which describes the property, is stated in the case in *Carthew*, and is very obvious. In the case of an execution, the sheriff must see to it that he takes only the property of the defendant; his authority is limited to that; but in the case of a writ of replevin, the property to be taken is distinctly pointed out.

It is urged on the part of the plaintiff, and it constrtutes the chief argument of the learned justice who delivered the opinion in the case of *Stimpson* v. *Reynolds*, in support of the liability of the sheriff, that a contrary doctrine would be in hostility to general principles in respect to the right of property and remedies for its infringement. But as much so, in every case where the party at whose instance process is issued is not protected, is the rule making the process a protection to the officer executing it. Take the case of an attachment issued by a jus-

tice of the peace without the preliminary proof to confer juris diction; an execution without any judgment; and similar cases, the party who procured the process is a trespasser, but no remedy is allowed against the officer who served it. The argument is of as much force in the cases supposed, as in the present and like cases. That in the former the injured party is a defendant in the process, and in the latter not, makes no difference; a trespass has been committed on the rights of each, and on general principles one is entitled to the same remedy as the other. The right and propriety of extending protection to the officer is the same in each. Injustice may sometimes result to individuals from shielding the officer, as where the party obtaining the writ is pecuniarily irresponsible, but on the whole, justice is best promoted by granting the protection.

The entire absence of any provision in the statute for an indemnity to the sheriff for the taking of the property, confirms the position that no liability is thereby incurred by him. Ample security for the benefit of the party is provided for, by requiring a bond to the sheriff to prosecute the suit to effect, and for a return of the property, if the defendant recover, and a return be adjudged, and for the payment of all such sums of money as the defendant may recover; but none is required for the benefit of the sheriff. (2 *R. S.* 523 § 26, 527, § 32.)

When a claim of property in the goods is made by a defendant, or any other person who may be in possession, and the jury to be called thereupon by the sheriff sustains the claim, the sheriff must not deliver the property to the plaintiff, unless the plaintiff "shall indemnify the sheriff to his satisfaction for delivering the property," &c., not taking it. (2 *R. S.* 525, §§ 13 *to* 17.) In *Spencer* v. *McGowan*, (13 *Wend.* 256,) it is said by Sutherland, J., "These provisions are designed rather for the security and benefit of the sheriff, than of the party claiming the property; for although the jury may find in favor of the title of the claimant, the sheriff may still, and perhaps must, deliver the property to the plaintiff in replevin, if he will indemnify him. The person claiming title to the property is not pro-

hibited by these provisions, from taking any other course to try or enforce his right, which upon general principles he might have done before this act was passed." The learned justice, in *Stimpson* v. *Reynolds*, after referring to the sections of the statute last cited, and those remarks upon them, inquires, "Why provide for making the officer secure, if in all cases the process in replevin is a protection to him?" I admit, that from this portion of the statute, thus construed, no inference may be drawn that the legislature contemplated the sheriff might be liable for delivering the goods to the plaintiff after a claim of title was interposed; but if they did that would not be sufficient to create a liability if none in fact existed. I do not however think it clear that the construction referred to is correct. An indemnity is to be given, although the person who claims property in the goods is the defendant. What liability to the defendant would be incurred for which the sheriff would need indemnity? Those provisions may have been designed, like that for security in the first instance, for the benefit of the defendant—to afford him further security—and if so the statute is consistent. It is not denied that these provisions do not affect the right of the owner to pursue any other remedy to which he is entitled on general principles independent of them, but on general principles the officer is protected by his process valid on its face.

The present case does not call for the decision of any question as to the liability of a sheriff for delivering goods after a claim of property is made, as in this case there was no such claim.

It is supposed by the counsel for the plaintiff, that because the owner of the property might have retaken it from the sheriff, if he could do so peaceably, he might enforce his right to it by action against the sheriff. But this is a mistake. This position is fully answered in *Spencer* v. *McGowen*, before cited. The law fully recognizes the owner's right, and if he can, without force, obtain the property, will not hold him a wrongdoer for taking it; but it withholds from him an affirmative remedy by action against a ministerial officer, allowing him

an action only against other persons concerned in, or who instigated the taking. The judgment must be affirmed.

SELDEN, J., concurred.

JOHNSON, J., dissented.

Judgment affirmed.

[MONROE GENERAL TERM, September 3, 1855. *Selden*, *Johnson* and *T. R. Strong*, Justices.]

## S. L. and J. H. BREWSTER *vs.* BAKER.

By a written contract, made between N. T. and S. P. T., the latter agreed to pay the former $1300 in installments, and in consideration thereof N. T. agreed that S. P. T. might have the possession and use of a certain canal boat, &c., unless default should be made in the payment of the said sum of $1300, or some part thereof, or unless S. P. T. should do or attempt to do, any of the acts by the agreement prohibited; in either of which cases N. T. might take possession of the boat, &c. On the full payment of the $1300, N. T. was to execute and deliver to S. P. T. a bill of sale of said boat, and put him in possession. S. P. T. agreed not to take or attempt to remove the boat out of the state, or transfer or attempt to transfer, the same without the consent of N. T., or to do any thing to prejudice his title. In case default should be made in the payment of the said sum of $1300 or any part thereof, N. T. was to have the right to take and sell the boat and apply the proceeds to pay the balance unpaid, paying over the surplus, if any, to S. P. T. It was further provided that nothing contained in the contract should be so construed as to give S. P. T. any right or title to the boat, until such payment should be fully made; except the right to possess and use the same, in the manner and upon the conditions in such contract mentioned. *Held* that this instrument was an executory contract for a *sale* of the boat on condition, and not a *mortgage* thereof: the parties intending, in respect to the title, simply to agree for the sale and purchase of the boat for the sum specified; the sale, and vesting of the title, to be upon the condition of payment according to the agreement, and until payment the title to remain in N. T. JOHNSON, J., dissented.

*Held*, *further*, that S. P. T. could not acquire any title to the boat until he had paid the price; and therefore could not transfer any title to a third person, so as to enable the latter to hold the boat as against N. T. or his assignees and grantees.

Brewster *v.* Baker.

THIS was an appeal by the plaintiffs from a judgment entered upon the report of a referee. The action was brought to recover the value of a canal boat. The facts, and the legal questions arising on the trial, appear in the report of the case when it was before the court, on the appeal of the defendant. (16 *Barb.* 613.) On the second trial the referee reported in favor of dismissing the complaint, with costs; and judgment was entered accordingly.

*S. Mathews*, for the appellants. I. Nathaniel Thompson was clearly the owner of the boat in question, on the 30th of April, 1849. He transferred his title to the plaintiffs on the 23d of July, 1849; unless, therefore, N. Thompson parted with his title before the transfer to the plaintiffs, or unless the plaintiffs have parted with the title acquired by them from Thompson before the commencement of this suit, the plaintiffs were entitled to recover in this action. The fact that the defendant was a bona fide purchaser of the boat cannot change the rights of the parties. Unless the defendant has acquired title from the true owner, he will not be protected in his purchase. (*Williams* v. *Merle*, 11 *Wend.* 80.)

II. The contract between Nathaniel Thompson and Sidney P. Thompson gave to the latter no title to the property. (1.) The contract is executory and contains an agreement to sell at a future day, upon the payment by Sidney P. Thompson, of the purchase money, with a stipulation for the use of the boat in the meantime by the purchaser. In the language of Judge Oakley, in 2 *Sand. S. C. Rep.* 420: "It is exactly the case of leasing personal property, such as the furniture of a house, for permanent use, with the addition of an agreement to sell it at a future time, on receiving a stipulated price." In other words, it was a conditional sale and delivery, by which no title passed until the performance of the condition. (*Strong* v. *Taylor*, 2 *Hill*, 326. *Dresser Manufacturing Co.* v. *Waterson*, 3 *Metc.* 9. *Ayer* v. *Bartlett*, 6 *Pick.* 71; *S. C.* 9 *id.* 156. *Herring* v. *Willard*, 2 *Sand. S. C. Rep.* 418. *Porter* v. *Pettingill*, 12 *N. H. Rep.* 298. *Tibbetts* v. *Fowler*, 3 *Fairf. Rep*

341. *Bigelow* v. *Huntley*, 8 *Vermont Rep.* 151. *West* v. *Bolton*, 4 *id.* 558. *Sargent* v. *Gile*, 8 *N. H. Rep.* 325. *Jones* v. *Olmsted*, *MS.*) (2.) The express stipulation contained in the agreement, that no title should pass to Sidney Thompson until the full payment of the purchase money, is conclusive upon the parties in this case. Thompson, by the very terms of the contract, could not acquire any title until he paid the price, and he could not therefore transfer any title to the defendant. (*Barrett* v. *Pritchard*, 2 *Pick.* 512.)

III. The stipulation contained in the contract, for a sale of the property in default of the payment of the price as stipulated in the contract, did not render the instrument a mortgage. (1.) If Sidney P. Thompson acquired no title to the boat, he could not mortgage it; for the idea of a mortgage necessarily implies that the mortgagor has a title which he could transfer by way of mortgage. In this case, Thompson expressly stipulated that he should not by the contract acquire any title to the boat until the payment of the purchase money. How then could he mortgage it? (2.) The provision for a sale of the boat in case of default in payment, does not render the instrument a mortgage. Such a stipulation was manifestly proper for the protection of the purchaser; for if he had paid a considerable part of the purchase money and made default in the residue, he would lose what he had paid, unless he could have a sale and receive any surplus after paying the unpaid purchase money. But this stipulation gives to the vendor the right to do precisely what the law would entitle him to do in such a case. The plaintiffs, without this stipulation might have sold the boat in case of default in payment, and sued the vendee for the residue of the purchase money, after applying the proceeds of the sale. The necessity of the stipulation grew out of the fact that the vendor had parted with the possession, and of the expenses which he might be put to in resuming it. It was to provide for payment for the labor and expense of reclaiming the boat that this stipulation was inserted, and it was that alone which rendered it beneficial to the plaintiffs. (*Sands* v. *Tay-*

*lor*, 5 *John.* 395. *Bement* v. *Smith*, 15 *Wend.* 493. 497. *Maclean* v. *Dunn*, 4 *Bing.* 722.

IV. The receipt or instrument of the 29th of March, 1849, was improperly admitted in evidence. It was wholly immaterial. That instrument, as the proof shows, was rescinded, and cannot therefore affect the rights of the parties, under the contract of the 30th of April. It was rescinded by express agreement of the parties. It was also rescinded by the making of the contract of the 30th of April. That contract related to the same subject matter, and was substituted in the place of the first. (*Taylor* v. *Hilary*, 1 *Cromp. Mees. & Ros.* 743.)

V. The question of estoppel, raised on the former appeal, cannot be raised on the present. The referee has found against the defendant on the fact upon which the estoppel was based, and the defendant not having appealed, the finding is conclusive. The evidence in the case, however, shows that there was no foundation in fact for the estoppel.

*Sedgwick & Outwater*, for the respondent. I. The contract under which the plaintiffs claim to recover the boat in question is a personal mortgage, and is void as against a bona fide purchaser, it not having been filed as the law requires, and there being no change of possession. (4 *Comst.* 303.)

II. The plaintiffs having been notified of the sale of the boat to the defendant, and having received a part of the money paid by him on their debt, were bound to give the defendant immediate notice if they dissented from such sale, and not having done so for more than a year afterwards, they are concluded and estopped from setting up their claim as against the defendant.

T. R. Strong, J. The report of the referee against the plaintiffs, was placed by him, as I understand from the case and the points made on the appeal, upon the ground that the writing of the 30th of April, 1849, signed by Sidney P. Thompson, and therein designated as articles of agreement between Nathaniel Thompson of the first part, and Sidney P. Thompson of the second part, is a chattel mortgage from the latter to the former,

and is void as against the defendant, for the reason that there was no change of possession of the boat; that the writing was not filed as required by law in case of such a mortgage; and that the defendant is a bona fide purchaser. It does not appear from the case that the position was taken by the defendant before the referee, that the writing had not been filed, but it undoubtedly was, and the court will so assume, as no point founded on the omission is made by the plaintiffs. If the writing is a mortgage the report is correct; but if otherwise, as there is not, upon the finding of the referee as to the facts, any other ground on which the report can be sustained, it must be set aside and a new trial granted.

The writing expresses in substance, that the party of the second part agrees to pay to the party of the first part, $1300 at the times therein specified; that the party of the first part agrees the other party may have the possession and use of the boat, unless default shall be made in the payment of said sum or some part of it, or unless the party of the second part shall do, or attempt to do, any of the acts afterwards in said writing prohibited, in either of which cases the party of the first part may take possession and hold the boat subject to the provisions afterwards in said writing contained; that on the full payment of the sum of $1300 as provided, the party of the first part agrees to execute and deliver to the party of the second part, a bill of sale of the boat, and put him in possession, if he shall not then be in possession; that the party of the second part shall not take, or attempt to remove, the boat out of the state, or transfer, or attempt to transfer, the same to any person, without consent of the party of the first part, or do, or attempt to do, any act by which the title or possession of the party of the first part may be prejudiced; and that in case of default in payment of the $1300, or any part of it, the party of the first part shall have the right to take and sell the boat at public vendue, on giving such notice as is required on sales of personal property on execution, and in such case the proceeds shall be applied to pay the balance unpaid, interest and costs including traveling expenses and time, and if there be a surplus it shall be paid to

the party of the second part; but nothing in the agreement shall be so construed as to give the party of the second part or his assigns any right in or title to the boat until such payment shall be fully made, except the right to possess and use the same in the manner and upon the conditions in the agreement before mentioned.

In giving a construction to this writing, and determining its legal character, the intention of the parties must be sought, and that intention when ascertained must be carried into effect, unless it is contrary to law. Whatever obscurity and doubt exist in regard to what that intention was, are occasioned by the provision in the writing as to the right of the party of the first part, in case of default in payment by the other party, to take and sell the boat, and as to the application and disposition of the proceeds. But for that provision it would be clear the parties intended, in respect to the title, simply to agree for the sale and purchase of the boat for the sum specified, the sale and vesting of the title to be upon the condition of payment according to the agreement, and until payment the title to remain in the party of the first part. The language would not admit of any other even plausible interpretation. The clauses in regard to the possession and use of the boat by the party of the second part, and the prohibition of removing, transferring or attempting to transfer the boat, or attempting any acts by which the right of the other party, or his possession, might be prejudiced, are entirely consistent with that intention, and do not tend to establish any other. The possession and use of the boat as the property of the party of the first part, is allowed, and the prohibition imposed, is of acts concerning it as the property of the party of the first part. (*Strong* v. *Taylor*, 2 *Hill*, 326. *Ayer* v. *Bartlett*, 6 *Pick.* 71. 9 *id.* 156.)

Is there any thing in the provision for a right to sell the boat, and in relation to the proceeds of sale, calling for a different interpretation? If there is, it must be because it contains something inconsistent with that view of the writing. But I am not able to discover any thing of the kind. It appears to me there is perfect harmony between the provision and that inter-

pretation. The right of sale is a right to sell the boat not the interest of one party more than of the other, but the interest of each and of both; it is not a right conferred by the party of the second part, but it is one reserved, with his consent, by the party of the first part. It was sensible and proper with a view to the foreclosure of any equities of the party of the second part, and to avoid questions thereafter, to expressly reserve this right, even if it was not absolutely necessary. This provision for a sale may have been inserted for the protection and benefit of the party of the second part. It was certainly proper, in the view taken of the writing, that the avails of the sale should be applied, after paying expenses, to the balance remaining of the debt, inasmuch as the debt would not be discharged, in case of a sale, until paid. The law would have made this application if the writing had been silent on the subject. As to the payment to the party of the second part of any surplus after satisfying the debt and expenses, it may have been stipulated for his benefit, and it is in conformity with the spirit of the contract that he should have the property, or the avails, on full payment. It should require a striking and substantial inconsistency, to overcome the express language of the concluding clause of the writing, that nothing in the writing should be so construed as to give the party of the second part any right in or title to the boat until full payment.

The former contract between the parties is not entitled to any weight in the case, as the present writing was given as a substitute for it, and before the boat was delivered.

It was lawful for the parties to make an agreement like the present, according to the interpretation now given to it. The law sanctions conditional sales and executory agreements for sales on condition, equally with chattel mortgages.

Upon a former appeal in this case, when a new trial was granted, the opinion was expressed that the writing in question was a mortgage, but it was not necessary on that occasion to pass upon the question, as there was another ground on which the court had determined to direct a new trial. (16 *Barb.* 613) Upon a more full examination of the question, I am now

brought to a different conclusion. (*Barrett* v. *Pritchard*, 2 *Pick* 512.)

I think the judgment should be reversed and a new trial granted, with costs to abide the event.

WELLES, J., concurred.

JOHNSON, J. dissented.

New trial granted.

[MONROE GENERAL TERM, Sept. 3, 1855. *Johnson*, *Welles* and *T. R. Strong*, Justices.]

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## ELIZABETH DENNIS *vs.* DANIEL F. TARPENNY.

A certificate of acknowledgment of the execution of a deed, by a married woman, stating that on an examination before the officer "separate and apart from her husband" she acknowledged the execution of the same "without fear or compulsion from him," is a sufficient compliance with the statute requiring the officer to certify, upon an acknowledgment by a feme covert, that on "a *private* examination, apart from her husband, she executed the conveyance *freely* and without any fear or compulsion of her husband."

APPEAL, by the plaintiff, from a judgment entered at a special term. The action was ejectment, for dower, and was tried before the Hon. DANIEL PRATT, one of the justices of this court—a trial by jury being duly waived by the respective parties. The defendant, on the trial, admitted that the plaintiff was married to Britton Dennis, in the complaint mentioned, prior to the year 1800; and that the said Britton Dennis and the plaintiff continued and remained husband and wife from the time of such marriage until the death of said Britton Dennis, which took place in the year 1849. The defendant also admitted that he, the defendant, was in possession of the premises described in the complaint, at the time of the commencement of this action, and that he is still in the possession thereof; that the said Britton Dennis conveyed the prem-

ises in the complaint mentioned, in fee simple, by common warranty deed, on the 3d day of January, 1828, to William Dennis, and that said Elizabeth did not join in said conveyance; that said William Dennis conveyed said premises in fee simple, by common warranty deed, on the 23d of November, 1828, to John McVicar; that John McVicar conveyed said premises, in fee simple, by common warranty deed, on the 31st day of April, 1831, to Solomon Wheeler; and that Solomon Wheeler conveyed said premises, in fee simple, by common warranty deed, on the 30th day of December, 1834, to Daniel F. Tarpenny, the defendant in this action; that Britton Dennis was in possession of said premises at the time he conveyed the same, and that each of the other grantors was in possession of the premises at the time they respectively conveyed the same; that a demand of dower in said premises was made of the defendant, on behalf of the plaintiff, on the 5th day of May, 1853. John A. Dennis was then called as a witness on the part of the plaintiff, and proved that the several grantees took possession of said premises under the deeds executed to them respectively; and here the evidence closed on the part of the plaintiff. The defendant then gave in evidence a deed in fee simple from John McVicar and his wife, dated the 10th day, of December, 1829, conveying said premises to Eben J. Dennis, and stated that this was not with a view to show a different source of title, but admitted that there was a regular chain of title from Britton Dennis down to the defendant; and said deed was read in evidence. The defendant then offered in evidence a quitclaim deed, from the plaintiff to Eben J. Dennis, of the premises in question, dated the 10th day of December, 1830, on the back of which there was the certificate of an acknowledgment in the words and figures following, viz: "*Onondaga county, ss.* I certify that on the 25th day of December, 1830, came before me Elizabeth Dennis, grantor of the within deed, to me well known, and, on an examination separate and apart from her husband, acknowledged she executed the same for the uses and purposes therein mentioned, without fear or compulsion from him.

A. Eastwood, Com."

The counsel for the plaintiff objected to reading said deed in evidence, on the ground that the acknowledgment and the certificate thereof were insufficient to authorize the same to be read in evidence; that it did not appear by said certificate that the deed was acknowledged on the private examination of the said Elizabeth, nor that said deed was executed freely, as required by statute. The objection was overruled by said justice, who allowed the deed to be read in evidence; and the same was read in evidence, and the plaintiff's counsel excepted. The consideration expressed in said deed was one dollar. The plaintiff's counsel insisted that said deed was not sufficient to bar the plaintiff of her right of dower in said premises, and the justice decided that it was, and the plaintiff's counsel excepted. The plaintiff's counsel also insisted that the separate quitclaim deed could not bar the right of dower of said plaintiff in said premises, accruing by the subsequent death of her husband; and the justice decided that it did, and the plaintiff's counsel excepted. The plaintiff's counsel also insisted that in order to bar her inchoate right of dower, the plaintiff should have joined with her husband in the deed of said premises; and the justice decided that that was not necessary, and the plaintiff's counsel excepted. The said justice decided that the defendant was entitled to judgment under the pleadings and proofs, and for his costs to be taxed; and judgment was entered in his favor, accordingly.

*W. C. Ruger*, for the plaintiff.

*J. Noxon*, for the defendant.

*By the Court*, Bacon, J. It will probably be conceded, and if not, it may be assumed, that if the deed from the plaintiff to Eben J. Dennis of the premises in question, was properly acknowledged by the plaintiff, so as to entitle it to be read in evidence, the plaintiff's right of dower in the premises was effectually barred, and consequently this suit cannot be sustained. The only question in the case then is, whether the

deed was so acknowledged as to authorize its introduction by the defendant. The grantor was a married woman, and the officer who took the acknowledgment certifies that on an examination before him "separate and apart from her husband" she acknowledged the execution of the same "without fear or compulsion from him."

The counsel for the plaintiff insists that two important requisitions of the statute in reference to the acknowledgment of conveyances by married women have been omitted by the magistrate who took the acknowledgment, and that consequently the deed has no validity to pass her title to the premises in question. The provision of the statute (2 *R. S.* 758, § 13,) is familiar, and requires the officer in the case of a married woman, to certify that on "a *private* examination apart from her husband she executed such conveyance *freely* and without any fear or compulsion of her husband." He has omitted to state in the certificate in this case, either that the examination was "private," or that she executed the deed "freely;" and the question is whether the omission of these two statements renders the acknowledgment so defective as to exclude the deed from being offered in evidence. No particular stress is laid on the omission of the word "freely" in the acknowledgment, for since the decision in the case of *Meriam* v. *Harsen*, (2 *Barb. Ch.* 232,) that is no longer an open question. In that case the officer had omitted to state that the acknowledgment was made freely, but he added that it was made without fear or compulsion. The chancellor held that the word "freely" means only that she acted without constraint or compulsion, and when the certificate states these facts the requirement of the statute is answered.

But a more ingenious argument is made by the counsel for the plaintiff upon the effect of the omission to state that the examination was "private." It is contended that this does not mean simply that it is private in respect to the husband only, but that it is to be literally and absolutely private as to all the world; that the object of the statute is to save the wife from any possible constraint on the part of the husband, and that

her entire protection demands that she shall be free from the presence of any person whatever, except the officer to whom she makes the acknowledgment, since the husband might, through the presence of a third party in his interest, exercise a control as effective as if present in his own person. The argument is plausible, but it cannot, I think, be upheld upon a true construction of the statute, nor on authority. It is a little remarkable that no case has arisen in the courts of this state, where this precise question has been presented; since it must be manifest that in the vast number of acknowledgments that have been taken in this state, omissions of the character of the one in question must frequently have occurred.

But there are decisions in respect to other requirements of the statute, from which a strong analogy may be drawn, and considerations in respect to the construction it has practically received, which should be controlling in this case. Thus the statute provides, as it has for more than half a century, that the officer taking the acknowledgment shall certify that the person making the acknowledgement "is known to him to be the person described in and who executed the conveyance." In the case of *Jackson* v. *Gumeer*, (2 *Cowen*, 552,) the certificate of the magistrate stated that "A. B., to *me known*, came and acknowledged, &c." The court held this a sufficient acknowledgment. Ch. J. Savage says that if called upon to establish a form of certificate, he should certainly deem it best for the officer to certify that the grantor was known to the officer to be the person described in the deed, "but," he adds, "the legislature could not expect the officer to know that the grantor described in the deed actually executed it, otherwise than by his acknowledgment, or proof by a witness. The form used in the case has been in very general use, and the practice in this respect may perhaps amount to a construction of the act." In the case of *Duval* v. *Covenhoven*, (4 *Wend.* 561,) an acknowledgment of the same character was also held perfectly good. (*See also Troup* v. *Haight*, *Hopk.* 239.)

The same course of reasoning which led the chancellor to hold that the omission of the word "freely" did not invalidate

an acknowledgment, where the certificate stated that the conveyance was executed without fear or compulsion of the husband, conducts us to the conclusion that the omission to state that the examination was "private," does not affect the validity of the acknowledgment here. The use of the words "without fear or compulsion," is only another mode of stating that the acknowledgment was freely made, and the phrase is added simply for the sake of greater caution; the latter words being in effect the correlative of the former. If the wife executes the deed without fear or compulsion, she manifestly does it freely, and the object of the statute is fully secured. In like manner the word "private" is qualified and explained by the superadded phrase, "apart from her husband." Otherwise these words would seem to be meaningless, for if by "private" is meant the absence of all persons whatever, why should the other words be added, "apart from her husband," who would be necessarily excluded, unless, as it is pertinently said, "man and wife are literally as well as figuratively one." The design of the statute, it seems to me, obviously is to secure the wife from the control or interference of her husband, and from his alone. It does not contemplate the remote possibility that an influence may be exerted by the passive presence of a third party. Such influence might as readily be assumed to exist by the presence of the examining officer, who, it may not be a violent presumption to suppose, may as easily be converted by the absent husband into an instrument of constraint or intimidation. If it be objected that by this construction the legislature has used more words than are necessary to convey their meaning, this may readily be granted; and the same reason exists for such use as in the corresponding phrases which are employed to secure the existence of the other important qualification, that she is to be exempt from fear or compulsion. When that fact is stated, it follows that she executes the conveyance freely; and when the examination is stated to be apart from the husband, it equally follows that it is private in respect to the only party whose exclusion is deemed necessary, in order to secure her voluntary and unbiased acknowledgment.

It has been repeatedly held in the courts of other states as well as of our own, that a certificate of acknowledgment is good if it shows a substantial, though not a verbal, compliance with the requirements of the act concerning the acknowledgment of conveyances. (*See Luffboro* v. *Parker*, 12 *Serg. & Rawle*, 48; *Shaler* v. *Brand*, 6 *Binn.* 435; *Dundas* v. *Hitchcock*, 12 *How. U. S. Rep.* 257; *Webster* v. *Hale*, 2 *Har. & McHen.* 19; *and Den* v. *Geiger*, 4 *Halst.* 225.) The latter case decides the very point in question here. The certificate omitted to state that the acknowledgment was made on a *private* examination, or that it was *without fear* of the husband, although the statute required both things to be certified by the magistrate. The court held the acknowledgment to be a substantial fulfillment of the requirements of the act, and the deed was admitted in evidence.

Some stress is laid, in the case last cited, upon the consideration that by long usage the statute had received a practical construction, which it would be unwise and eminently unsafe to disturb. The same position is taken and elaborately vindicated, by Chancellor Sanford, in *Troup* v. *Haight*, (*Hopk.* 268,) and approved by Chancellor Walworth, in *Meriam* v. *Harsen*, (*cited supra.*) General usage, long continued and hitherto unquestioned, has great force; and the practical construction of the law by so many public officers, though not given upon adverse litigation, must have much of the weight of judicial decision. I can easily imagine that a decision holding the acknowledgment in this case defective, would unsettle half the titles in this state, and I have no ambition, upon a point so narrow and technical, to open the flood-gates of endless and destructive litigation. The hand might well hesitate to apply the torch where extensive devastation would inevitably follow, and the fame of the Ephesian incendiary, though wide as the world and lasting as time, has never been considered one greatly to be coveted. It is undoubtedly true that some decisions have been made in the courts of our sister states which maintain the doctrine contended for by the plaintiff's counsel, and hold acknowledgments like the one in question de

fective. I have not, however, been able to examine them in connection with the statutes upon which they are founded, with sufficient care to determine how far they are entitled to consideration on a question of this character. But whatever may be their binding force within the jurisdictions where they arose, I am satisfied that the weight of sound authority as well as of reason, is in favor of the view I have endeavored to maintain. The result is, that the ruling at the circuit was right, and the judgment must be affirmed.

[Jefferson General Term, July 2, 1855. *W. F. Allen, Pratt, Hubbard* and *Bacon*, Justices.]

20 378
28 248
58 635
5L 186
1h 667
3h 290

## Hammond and others *vs.* The Hudson River Iron and Machine Company, Mears and Beach.

An action will lie, in aid of a suit at law, to reach property and effects in the hands of parties who, it is alleged, have fraudulently received the same from the judgment debtors, and unjustly assert a claim thereto against the plaintiff's judgment and execution

The remedy, where a creditor's bill was proper previous to the code, is still preserved, in the form of an action in the supreme court.

The judgment creditor may commence the action for his own benefit, or in behalf of himself and all others in the same situation with himself who may choose to come in and contribute to the expenses of the suit. The rule has not been changed by the code.

It is not a subject of demurrer that all the creditors of the judgment debtors are not joined as plaintiffs.

A judgment creditor, who has exhausted his remedy at law, may obtain relief against his debtor's property in the hands of a fraudulent assignee, by a direct action against the debtor and the assignee, to reach the property thus held under the void assignment.

Where, in an action brought by a judgment creditor, against the judgment debtor, in aid of the suit at law, the complaint alleges that property and money received by third persons under and by virtue of a fraudulent assignment and judgment, was the property of the judgment debtor, such third persons are necessary parties to the action.

And where, independent of any claim such third persons might set up as owners of the property sought to be reached by the action, they were charged by

clear, distinct and specific allegations in the complaint, with fraudulent and unlawful acts, and with efforts to hinder and delay the plaintiffs in the collection of their debt; *Held*, on demurrer, that this was enough to render them proper parties to the action.

Where the subject of an action is the property of a judgment debtor, and the cause or ground of action is an impediment thrown in the way of collecting the plaintiff's judgment, and the object of the action is to remove the impediment —all other results being merely incidental, such as accounting, and applying the avails of the property which may be reached—and the defendants are charged jointly with the commission of the fraudulent acts, and they are alike concerned in the judgment, or thing to be recovered, although their interests, as to separate parts, are distinct, the complaint will be held to contain but one cause of action.

DEMURRER to the complaint. The complaint set up the recovery of a judgment in favor of the plaintiffs against the Hudson River Iron and Machine Company, a corporation duly organized, the issuing of an execution thereon to the proper county, and its return by the sheriff unsatisfied. That the amount of the judgment remained due, and that the plaintiffs were the owners thereof. That the company had property, equitable rights and choses in action, which ought to be applied on the judgment, and that the company was insolvent. That the defendants, Mears and Beach, claimed property and effects belonging to the company, as assignees, under an assignment from the company to them, as a security for indorsements by them for the company, and had disposed of some part thereof; which assignment was alleged to be fraudulent and void as against the plaintiffs and other creditors. That the defendant Beach obtained a judgment against the company for the same debts and liabilities to secure which the assignment was made, and under execution issued thereon sold property and satisfied the same. That such judgment was fraudulently procured by Beach in collusion with the company and with Mears, and was fraudulent and void. That the company were insolvent when the assignment was made, and when the fraudulent judgment was obtained. That Beach and Mears were original corporators, and stockholders of the company, and ever since then had been and still were stockholders for nearly one-half of the amount of the capital stock; and that Mears, at the time of the making of the assign-

ment, was the treasurer of the company, and executed the same for and in behalf of the company. That Beach and Mears claimed, under the assignment, all the company's property, both real and personal. That Beach was in the possession of the real estate mentioned in the assignment, carrying on business, and that Mears acted as his agent. That the indebtedness for which the plaintiffs' judgment was obtained accrued before the making of the assignment.

The plaintiffs demanded as relief, that the assignment and judgment be adjudged fraudulent and void, and that the defendants Beach and Mears account for the property, with the avails of the property received by them and each of them under or by virtue of the same, and that the company might be decreed to pay the plaintiffs the amount found due them with costs, and be adjudged to apply for that purpose all property, money and effects belonging to it or held in trust for it, or fraudulently transferred to Beach and Mears. The complaint also asked for the appointment of a receiver, and for an injunction.

*Romeyn & Taber*, for the plaintiffs.

*A. D. Waite*, for the defendants.

Bockes, J. This action is brought in aid of the suit at law, to reach property and effects in the hands of the defendants Mears and Beach, who it is alleged have fraudulently received the same from the judgment debtors, and unjustly assert a claim thereto against the plaintiffs' judgment and execution. The proceeding is one formerly recognized and much favored in the court of chancery. Its object was to assist an honest creditor, and to defeat the purposes of those fraudulently combining to avoid the due execution of the law. The remedy, when a creditor's bill was proper before the code, is still preserved in the form of an action in this court. (*Rogers* v. *Hein*, 1 *Code Rep.* 79. *Dunham* v. *Nicholson*, 2 *Sandf.* 636. *Goodyear* v. *Betts and Smith*, 7 *How. P. R.* 187.) This being determined, the first objection raised by the demurrer should be considered. It is

insisted that there is a defect of parties plaintiffs, inasmuch as all the creditors of the judgment debtors are not joined as plaintiffs. The question presented by this objection cannot be regarded as open for discussion, unless decisions are to be wholly disregarded. The creditor may commence the action for his own benefit, or in behalf of himself and all others in the same situation with himself who may choose to come in and contribute to the expenses of the suit. (*Edmeston* v. *Lyde*, 1 *Paige*, 637. *Wakeman* v. *Grover*, 4 *id.* 23.) The rule has not been changed by the code. (*Habicht* v. *Pemberton*, 4 *Sandf. S. C. R.* 657. *Brownson* v. *Gifford*, 8 *How. Pr. Rep.* 389, 395.) Under the practice in chancery the creditor whose suit was first commenced, if the suit was brought for his own benefit only, obtained a priority of lien on the judgment debtor's property and effects (except real property) over other creditors whose actions were afterwards commenced, and was entitled to a priority of payment from the avails thereof. (*Corning* v. *White*, 2 *Paige*, 567. *Edmeston* v. *Lyde*, 1 *id.* 637. *Fitch* v. *Smith*, 10 *id.* 9. *Wheeler* v. *Wheedon*, 9 *How. Prac. Rep.* 293.) The creditor thus obtains the reward of diligence. When the action is brought to set aside a general assignment for the benefit of the creditors of the judgment debtor, the assignee is deemed to represent all the creditors, and his defense is their defense. As beneficiaries of the trust, they are to be regarded as represented by their trustee. (*Russell* v. *Lasher*, 4 *Barb.* 232. *Wakeman* v. *Grover*, 4 *Paige*, 23. *Bank of Brit. N. America* v. *Suydam*, 6 *How. Pr. Rep.* 379. *Wheeler* v. *Wheedon*, *supra.*) Consequently they are not necessary parties to the action.

In the case under consideration the assignment and judgment sought to be set aside, conferred no benefits or advantages upon any persons except the defendants Mears and Beach: hence they do not represent the interests of any one, in the property, except themselves. But they are in no better situation, on that account, to insist on the objection that there is a defect of parties plaintiffs. This action is therefore well brought by the plaintiffs "as well for themselves as in behalf of all others having similar interests with them in the subject matter thereof,

and in the relief sought to be obtained thereby, and who may choose to come in as parties plaintiffs to this suit and contribute their shares of the expenses thereof." How far this clause of the complaint, and how far the fact that the judgment debtor is a corporation, will affect the plaintiffs' right to an application of the funds to be acquired by this action, if any are acquired—supposing that other creditors should come in to claim the advantages to arise from this prosecution—it is unnecessary now to decide. As to the application of the funds, see *Morgan* v. *N. York and Albany Rail Road Co.*, (10 *Paige*, 290.)

The second ground of demurrer is that the defendants Mears and Beach are improperly joined with the company, as defendants.

By the complaint they are charged with being the fraudulent assignees of the company's property, and also beneficiaries of a fraudulent judgment against it. And the complaint prays that the assignment and judgment may be decreed void, and that Mears and Beach may be compelled to account for the property, and the avails thereof claimed and appropriated by them under the same, to the end that such property and avails may be applied in satisfaction of the plaintiff's debt. The object of the action is to reach the property of the company and the avails thereof which have come into the hands of Mears and Beach under the assignment and judgment. This purpose cannot be obtained without giving them an opportunity to litigate their right thereto. Before their claim can be barred they are entitled to a day in court. And to them it can make no difference whether the action to determine their claim is brought by the creditor, or by a receiver for his benefit. It was doubted, at one time, whether a receiver could maintain an action to set aside a fraudulent conveyance made by a judgment debtor; but that doubt has been removed by a late decision in the court of appeals, whereby it is held that he may. But I am not aware of any case deciding that a judgment creditor having exhausted his remedy at law, may not obtain relief against his debtor's property in the hands of a fraudulent assignee, by a direct action against him to reach the property thus held under the void assignment. Nor can I conceive of

any principle on which such a decision could be made or upheld. It has been the practice from a very early day, to institute proceedings in form and theory like this, differing only in some unimportant specific allegations in regard to the alleged fraudulent acts of the parties. *Spader* v. *Davis*, (5 *John. Ch.* 280; *affirmed in court of errors*, 20 *John.* 554,) may be regarded as a leading case in this state, although the doctrine of that case had been recognized in some earlier decisions. Similar actions are to be found in almost every book containing reports of cases in chancery to the present day. (*Leitch* v. *Hollister*, 4 *Comst.* 211. *Barney* v. *Griffin*, 2 *Comst.* 365.) Nor does the code offer any impediment to this action, for if, as has been seen, (1 *Code Rep.* 79; 2 *Sandf.* 637,) the remedy, when a creditor's bill was proper before the code, is still preserved in the form of an action in this court, the additional relief sought against the fraudulent assignees of the judgment debtor may be obtained also. Section 299 of the code applies to those cases only where proceedings supplementary to execution have been instituted under chap. 2, title 9 thereof. (*Goodyear* v. *Betts*, 7 *How. Pr. Rep.* 187.) It will not be claimed, probably, that the judgment debtor, in an action to set aside a fraudulent disposition of his property, is not a necessary party—especially in a case like this, where the debtor still has an interest in the property assigned—the same being transferred as security only. (*Vanderpoel* v. *Van Valkenburgh*, 2 *Seld.* 190. *Story's Eq. Pl.* § 153.) It is equally obvious and well settled that the fraudulent assignee should be made a party. (*Gray* v. *Schenck*, 4 *Comst.* 460. *Fellows* v. *Fellows*, 4 *Cowen*, 682. *Boyd* v. *Hoyt*, 5 *Paige*, 65. *Story's Eq. Pl.* § 155.) The property of the judgment debtor is the subject of the action, and no rule is more apparent or more general in its application to chancery pleading, than that all the parties interested, or claiming an interest therein, should be made parties. This is necessary in order to a full and complete determination of the suit.

In this case the property and money received by the defendants Mears and Beach, under and by virtue of the assignment and judgment, are alleged by the complaint to have been and

to be the property and money of the company. Hence they must be held, in deciding this case on demurrer to the complaint, necessary parties to the action. (*Code*, § 118.)

But independent of any claim they may set up as owners of the property, sought to be reached by this action, the defendants Mears and Beach are charged, by clear, distinct and specific allegations in the complaint, with fraudulent and unlawful acts, and with efforts to hinder and delay the plaintiffs in the collection of their debt. That is enough to hold them, on demurrer, as proper parties to the action. (*Brady* v. *McCosker*, 1 *Comst.* 214. *Huggins* v. *King*, 3 *Barb. S. C. Rep.* 616.)

It was remarked on the argument, that inasmuch as the complaint alleged a sale of the company's property on execution, and that the same was liable to be applied on the plaintiff's judgment, therefore the several purchasers on the execution sale should be made parties. But the statement in the complaint when condensed, is, in substance, that the judgment was fraudulent, and that the defendants were therefore the fraudulent recipients of the avails of the sale; and the plaintiffs seek now to charge the defendants, Mears and Beach, with the value or avails of the property sold.

The third ground of demurrer is, that several causes of action have been improperly united.

The subject of the action is the property of the judgment debtor; the cause or ground of action, is the impediment thrown in the way of collecting the debt; and the object of the action is to remove the impediment. All other results are merely incidental, such as accounting and applying the avails of the property which may be reached. The complaint, therefore, contains but one cause of action. The judgment prayed for, or to which the plaintiffs are entitled under the facts stated in the complaint, taken as admitted, would affect the parties alike. It would declare the assignment and judgment fraudulent and void, and that in law and in fact, the property and its avails received under them were subject to the payment of the company's debts, and should be applied in payment thereof; and the accounting, and the decree to pay over

by them the amount they respectively might have received of the company's property, would be but carrying out the judgment equitably as between the parties. The defendants are charged jointly with the fraudulent acts; they are alike concerned in the judgment or thing to be recovered, although their interests as to separate parts are distinct. Like *Fellows* v. *Fellows*, (4 *Cowen*, 682,) this case must be considered as falling within the class of cases where there is a common interest centering in the point in issue in the cause.

The allegation in regard to the real estate, and Beach's possession thereof as principal, and Mears' as agent, were proper, in order to authorize a clause in the decree, declaring the plaintiffs' judgment equitably entitled to a priority of lien, over the alleged fraudulent assignment and judgment, set up by the defendants. If these should be set aside the other judgments against the company would become liens on the real estate in the order in which they were docketed.

It may be proper to add a few considerations in regard to the judgment recovered by Beach. It is not sought to set that aside for irregularity, but for fraud. It is alleged that the judgment was obtained for the same indebtedness which formed the consideration of the alleged fraudulent assignment, and that it was obtained fraudulently and collusively, and that the same is fraudulent and void; and it is also alleged that Mears was interested therein. As the facts are stated in the complaint, the assignment and judgment would probably stand or fall together. There are some shades and points of difference, but there are considerations common in their application to both judgment and assignment, which on this demurrer must be deemed sufficient to authorize the court to set them both aside in one action.

The defendants are charged with setting them on foot and upholding them for the purpose of hindering, delaying and defrauding the creditors of the company in the collecting of their debts. Some of the facts on which the plaintiffs rely to sustain the charge are stated, from which it appears, that in one view to be taken of the case, they stand alike and on the same facts

It is probable there are some unnecessary allegations in the complaint. Perhaps it would have been enough to have alleged the judgment and execution, with a return thereof unsatisfied, the assignment and judgment and the defendants' claims thereunder, and that the same were made and procured to hinder, delay and defraud the creditors of the company. But the question, on demurrer, is not whether the pleadings contain redundant or irrelevant matter, but whether a cause of action is stated in the complaint.

It is not deemed necessary to decide whether the complaint would be considered good for the purpose of winding up the affairs of the company. If the views above suggested are correct, it is good for the purpose of reaching the property of the company in the hands of Mears and Beach, who, it is alleged, unlawfully claim it, and placing it in the hands of a receiver, to be applied according to law in satisfaction of its debts.

The complaint contains no allegation that the action is not preferred and prosecuted by collusion or for the purpose of protecting the property and effects of the debtor against the claims of other creditors. This allegation was rendered necessary in the late court of chancery by a rule of the court, and an omission of this averment was held to be good ground of demurrer. (*McElwain* v. *Willis*, 3 *Paige*, 505.) The present rules of the supreme court have not adopted the chancery rule referred to, unless it must be regarded as adopted by rule 90. In *Quick* v. *Keeler*, (2 *Sandf.* 231,) it was decided that the rules of the court requiring certain allegations to be inserted in a creditor's bill were superseded by the code, and that it was enough if the plaintiff complied with the requirements of the code, and the provisions of the statute, in setting forth the cause of action.

But in this case, this objection is not specially pointed out by the demurrer, nor was it mentioned by the defendant's counsel, on the argument or in his brief. If indeed a valid objection, it should be considered as waived, under the circumstances of this case.

The plaintiff is entitled to judgment on the demurrer, with

costs. But the defendants are at liberty to withdraw the demurrer and to put in an answer to the complaint within twenty days, on payment of the costs of the demurrer, which, in cases like the present, are fixed at $23.

[Saratoga Special Term, January 22, 1855. *Bockes*, Justice. Affirmed at the St. Lawrence General Term, September 3, 1855. *Bockes*, *C. L. Allen* and *James*, Justices, and above opinion adopted, as the opinion of the court.]

## Lewis *vs.* Trickey.

20 387
22 136
65 468
2L 163
39h 74

Where one person performs labor for another, the law presumes a request, and a promise to pay what such labor is reasonably worth, unless it is understood that it is to be performed gratuitously, or it is performed under circumstances which repel the presumption of a promise that compensation shall be made.

Where an employer agrees to render an equivalent for services performed, it is no defense to an action against him to recover compensation, that he agreed to pay some third person who has no legal claim to the service, or right to the compensation; especially where the defendant does not show that he has in fact paid such third person.

When payment for labor is to be made, the law will give it to him who performs the labor, unless some other person can show a better title.

The value of services may be proved by the opinions of witnesses who are acquainted with the value of labor in the vicinity.

But a defendant cannot prove by witnesses what the plaintiff's services were worth over and above his board, clothing, &c. furnished by the defendant, without proving or offering to prove that the witnesses knew the quantity or value of either item assumed by the question to have been furnished.

Neither can the defendant be permitted to ask a witness how much *under all the circumstances*, were the plaintiff's services worth, over his board.

APPEAL by the defendant from a judgment entered at a special term, upon the report of referees. The action was for work and labor, done upon the farm of the defendant from June, 1839, to November, 1844, by the plaintiff, at $12 per month. The answer denied the indebtedness alleged in the complaint, and set up as a defense that the plaintiff, some time

in the year 1839, then being an indented apprentice to Peter Townsend, under the statutes of this state, was sent by him to the farm of the said Peter Townsend, in the town of Bristol, which the defendant worked for the said Peter Townsend, to learn the trade and science of farming; and continued to reside with the defendant on the said farm until the latter part of the year 1843; that while he so resided with the defendant on the said farm he was furnished with board, clothing, schooling and pocket money; and that whatever services were rendered by him, during his stay on said farm, were rendered and performed by him for the said Peter Townsend as his indentured apprentice; and that none of the said labor or services were performed by the plaintiff, as alleged in the complaint, within six years next before the commencement of this suit. The defendant also claimed that the plaintiff was justly indebted to him, in the sum of seven hundred dollars over and above all offsets and payments, for board, clothing, schooling, one cow, one yoke of oxen, farming stock and farming implements, furnished by the defendant to the plaintiff at his request. The answer was put in issue by a reply.

On the trial before the referees, after the plaintiff had proved the performance of the services, as charged in the complaint, his counsel asked a witness "what were the services worth, in your judgment?" This question was objected to by the defendant's counsel, and the objection was overruled by the referees, and the defendant's counsel excepted. The witness answered, "I should think his services were worth about $12 for the last two years he worked there, for the third year about $10 per month, for the first and second years about $8 per month."

All the evidence given on the part of the plaintiff in regard to the value of his services by the month, was objected to by the defendant's counsel, at the time it was offered, because no foundation had been laid for such proof, and also because it did not appear that the plaintiff had ever worked for defendant in the capacity of a hired man, by the month or otherwise. The said objections were overruled by the referees, and the evidence admitted, and the defendant's counsel excepted. The plaintiff

rested his case, and the defendant's counsel moved for a nonsuit, on the ground that there was no proof that the defendant ever employed the plaintiff, or promised to pay him any thing for his services, or that they were, in fact, of any value. Motion denied by the referees, and the defendant's counsel excepted. A witness for the defendant was asked the question, "what, in your opinion, were the services of the plaintiff worth to the defendant the first year, under the circumstances he was placed in, besides his board?" Objected to by plaintiff's counsel. Objection sustained and question overruled, and the defendant's counsel excepted. Question. "What in your opinion were his services worth over and above his board during the whole time the plaintiff was with the defendant?" Objected to by the plaintiff's counsel. Objection sustained, and the defendant's counsel excepted.

The referees, by their report, found that the plaintiff lived with and worked for the defendant from the middle of June, 1839, to the middle of November, 1844, in all, five years and five months. That the plaintiff and defendant from the beginning to the end of said time believed, and acted on the belief, that the plaintiff was the apprentice regularly bound, of one Peter Townsend, by whom the plaintiff was placed in the service of the defendant. That during all said time the plaintiff was a minor. That in 1837 an indenture of apprenticeship, purporting to bind the plaintiff to said Peter Townsend, was executed within this state, by the plaintiff, by said Townsend, and by the maternal grandfather of the plaintiff, with whom the plaintiff was then and had been living for about nine years. That the plaintiff so lived with said grandfather with the knowledge of his mother, who was then and is yet living. That the plaintiff was born out of wedlock, and that his mother did not execute any consent to said mentioned indenture. And they found as matter of law, that said indenture was not made and executed according to the statute, was illegal, and of no validity. They found as matter of fact, that the plaintiff's labor during the period he worked for the defendant was of the value of $351. That during said period, the defendant fur

nished the plaintiff with board, clothing, schooling, a cow, and various articles, to the value in all of $284. And they reported that there was due the plaintiff from the defendant, $67, with interest from November 12th, 1844; for which sum, with interest and costs, judgment was rendered in favor of the plaintiff.

*James C. Smith*, for the plaintiff.

*S. V. R. Mallory*, for the defendant.

*By the Court*, JOHNSON, J. Where one person performs labor for another, the law presumes a request, and a promise to pay what such labor is reasonably worth, unless it is understood that it is to be performed gratuitously, or if it is performed under circumstances which repel the presumption of a promise, that compensation shall be made. In this case it was understood that the defendant was to make compensation for the plaintiff's services. Townsend, who claimed the plaintiff as his apprentice at the time he went into the defendant's service, expressly testifies that he required an equivalent from the defendant for the plaintiff's services, in making improvements upon the farm, such as fencing, clearing land and the like. The defendant then occupied the farm as the tenant of Townsend, working it on shares. There being an express agreement or understanding that compensation for the services was to be made, the only question that can possibly arise as to the right of action, is whether the plaintiff can maintain it for the services thus rendered. It does not appear from the evidence that the defendant has ever made the compensation agreed upon, to Townsend, so that the case is relieved from all embarrassment on that score. And indeed it is difficult to see how Townsend ever had any right to demand or receive the equivalent stipulated for. His claim rested upon the indenture of apprenticeship alone, and that not having been made or consented to by any authorized person, was entirely void. (2 *R. S.* 154, §§ 1, 2, 3.) The plaintiff's grandfather, who had brought

him up from infancy, and who, as appears from the case, had formerly stood *in loco parentis*, could make no claim, as he had previously relinquished voluntarily all claim to the services. And the mother, although living at the time of the trial, must be presumed from the evidence, to have relinquished all her claims to control either the plaintiff's person or his earnings, many years previous to the time when the services in question were rendered. For aught that appears therefore, the plaintiff is the only person who has any legal claim to his own earnings. This case steers entirely clear of the cases of *Williams* v. *Finch*, (2 *Barb. S. C. R.* 208;) *Williams* v. *Hutchinson*, (3 *Comst.* 312;) *Livingston* v. *Ackeston*, (5 *Cowen*, 531,) and the other cases cited by the defendant's counsel. Those cases all turn upon the fact, that the services for which compensation was claimed, were from the very nature of the case to be rendered without compensation, and therefore no legal liability to pay was ever incurred. Not so here. The plaintiff was not the defendant's apprentice, but his hired servant. The defendant expected and agreed to render an equivalent for the services, and it is no answer for him to say that he agreed to pay some person who has no legal claim to the service or the compensation; especially as he does not show that he has paid any one. Where payment is to be made, the law will give it to him who performs the labor, unless some other person can show a better title.

The referees decided correctly in allowing the plaintiff to prove the value of his services by the opinions of witnesses who were acquainted with the value of labor in the vicinity. They also decided correctly, I think, in rejecting the evidence on the same subject offered by the defendant. There is no such difficulty in reconciling the decisions as the defendant's counsel seems to suppose. The defendant offered to prove by his witnesses what the plaintiff's services were worth over and above his board, clothing and schooling furnished by the defendant, without proving or offering to prove that the witnesses knew the quantity or value of either item assumed by the question to have been furnished. This, as the referees properly suggest,

in making their decision, would be putting the witness in their place and making him judge of the entire case. They held that the defendant might prove the value of the whole on each side. Of the same character, and liable to the same objections, is the evidence offered in this form: How much under *all the circumstances* were the plaintiff's services worth over his board? The form of the question implies the existence of some modifying or qualifying circumstances, which the witness might take into the account, and pass upon, instead of disclosing them in the evidence for the referees to pass upon.

There was, in my judgment, no error committed at the trial, nor in the conclusions of law, upon the facts established, and the judgment should be affirmed.

[Cayuga General Term, June 4, 1855. *Selden*, *T. R. Strong* and *Johnson*, Justices.]

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## William S. Briggs *vs.* John J. Palmer, special receiver.

Where assignees, under an assignment made for the benefit of creditors, reconvey to the assignor the real estate embraced in such assignment, without having paid and satisfied the debts for the payment of which the trust estate was created, such reconveyance is absolutely void, at least as to all creditors whose debts were provided for in the assignment, and which remained unpaid at the date of the reconveyance.

And in a contest between a person claiming title under and in consonance with the trusts created by the assignment, and an incumbrancer of the title attempted to be conveyed by the trustees in contravention of such trusts, the validity of the mortgage will be in no way helped by the fact that the mortgagees, at the time of taking it, had no actual notice of the existence of a claim against the trust estate, or of the assignment, and reconveyance.

The assignment, and the reconveyance, are matters of record, which the statute makes sufficient notice to all subsequent purchasers and incumbrancers. And such purchasers or incumbrancers, having constructive notice of the assignment, are put upon inquiry as to all claims and rights under it.

Trustees cannot, by a recital in a reconveyance of the assigned property, contrary to the fact, affect the interests of *cestuis que trust*. Therefore a recital that the debts of the assignor have all been paid, will be of no avail.

Briggs *v.* Palmer.

After a debtor has assigned his real estate in trust for the benefit of creditors, he, having no title, cannot create an incumbrance upon the estate. A mortgage executed by him will therefore, at most, only operate as an assignment or equitable mortgage of his residuary interest, after the trust shall have been fully executed. Under this, the mortgagee may, *it seems*, pay a debt existing against the trust estate, before a sale of the trust property to pay the debt, and a transfer of the title.

But after the title has passed to a bona fide purchaser at a judicial sale ordered for the purpose of satisfying a previous debt of the assignor, there can be no *redemption* by any one standing in the position of the assignor, or claiming under him subsequent to the creation of the trust estate.

THIS was an appeal, by the defendant, from a judgment entered at a special term. The relief demanded by the complaint was that the defendant be directed to release and discharge certain premises from the lien and operation of a mortgage thereon, executed by Cornelius Masten and wife to Joseph D. Beers, president of the North American Trust and Banking Company, on the 1st of November, 1838; and that he, and all persons claiming an interest in said mortgage subsequent to the commencement of this action be perpetually enjoined from foreclosing the same, or enforcing the lien thereof against the premises described in said mortgage. The action was tried at the circuit in Yates county in November, 1853, before Mr. Justice WELLES, without a jury, when after hearing the proofs and allegations of the respective parties, the following facts were found by the court, to wit: That Cornelius Masten, on the 21st day of April, 1834, being in embarrassed circumstances, made a general assignment of all his property and effects to Joel Dorman, Evert Van Buren and James C. Robinson, in trust for the benefit of his creditors, as mentioned and set forth in the complaint. That said deed of assignment was duly acknowledged and recorded in the office of the clerk of Yates county, on the 29th day of April, 1834, in the book of deeds, as a deed conveying real estate. That immediately after the execution and delivering of the said deed of assignment, Dorman, Robinson and Van Buren, as assignees and trustees under the same, accepted the trust therein conferred, and entered upon the execution of the said trust, and for that purpose took into their

possession and under their control the principal part of the assigned property. That at the time of making the said assignment Joel Dorman was liable as security and indorser for Masten to a large amount, the payment of which was provided for in and by the deed of assignment as mentioned in the complaint. That after making said assignment, Dorman in his lifetime advanced and paid large sums of money for Masten as his indorser, the payment of which was provided for in said assignment. That Dorman died on the 26th day of March, 1836, intestate, as mentioned in the complaint, and that Masten was indebted to Dorman at the time of his death, by reason of advances made by him as aforesaid. That after his death Reuben Crawford, Calvin S. Coates and David B. Prosser were duly appointed administrators, as mentioned in the complaint. That Prosser, one of the administrators of Dorman, after his appointment, and some time in the year 1837, called upon Robinson, one of the surviving assignees and trustees under the deed of assignment of the 21st day of April, 1834, and requested payment of the sum advanced by Dorman in his lifetime, for the use and benefit of Masten, and informed Robinson of the claim of Alva Clark against Dorman's administrators, as mentioned in the complaint. That the administrators of Dorman, on the 25th day of April, 1839, filed their bill in the court of chancery, before the vice chancellor of the seventh circuit, against Masten, Robinson and Van Buren, to compel payment of the debts alleged to be due to them, as the representatives of Dorman, and to have been provided for under the assignment. That no notice of lis pendens was filed. That after the final decree or judgment was obtained in that suit, certain premises were sold under the same, and purchased by the plaintiff, for the use and purpose mentioned in the complaint, and the premises duly conveyed to the plaintiff by the referee, and the possession thereof taken by him under his deed, and that he still so holds the same. That on the 17th day of September, 1838, Robinson and Van Buren, as surviving assignees and trustees under the deed of assignment of the 21st of April, 1834, under their hands and seals, after reciting the making of the assignment as aforesaid, and that the trust

had been executed, released and reconveyed to Masten, all the assigned property then remaining in their hands undisposed of, among which were the premises purchased by the plaintiff, which said deed or release was duly acknowledged and recorded in the office of the clerk of Yates county, on the 12th day of November, 1838, as a deed of real estate. That Robinson, Van Buren and Masten, at the time of making and executing said release, had notice of the claim of the personal representatives of Dorman upon the assigned property. That Robinson and Van Buren made and executed the said release in contravention of the provision of said deed of assignment and in violation of the trust therein expressed. That on the 1st of November, 1838, Masten and his wife made, executed and delivered a mortgage to Joseph D. Beers, president of the North American Trust and Banking Company, on the premises previously purchased by the plaintiff, for $9000, payable in one year with interest; which mortgage was recorded in the office of the clerk of Yates county, on the 4th day of May, 1839. That at the time of the recording of the said mortgage, no advancement or payment had been made to Masten on the account thereof. That on the 21st day of May, 1839, this mortgage was delivered to the North American Trust and Banking Company, and that company issued and delivered to Masten ninety shares of the stock of said company at $100 per share, amounting to $9000, as the consideration for said mortgage. That said stock was issued and delivered to Masten in good faith, without actual notice of the claim of Dorman or his personal representatives. That the abstract of title made by the clerk of Yates county for the said company, bearing date the 5th day of May, 1839, and upon which the agents of the company acted in receiving said mortgage and issuing the stock thereon, did not contain the said assignment of the 21st of April, 1834, or the release of the 17th September, 1838, or any note, reference or allusion to them or either of them. That Masten continued to reside in one of the dwelling houses upon the premises from the time of making the assignment until the time of his death, on 31st October, 1850. That Robinson, one of the surviving assignees, is insolvent, and has been so since

1840, and that the defendant, as the special receiver of the North American Trust and Banking Company, is the assignee and holder of the mortgage given by Masten and wife to Beers, as mentioned in the answer of the defendant. The court found, as conclusions of law from the foregoing facts, 1st. That the release or reassignment of the 17th September, 1838, executed by Robinson and Van Buren to Masten, as between the parties thereto, was absolutely void, and that no title passed under the same to Masten, so far as the claim of the personal representatives of Dorman was concerned. 2d. That the plaintiff in this action as the purchaser of the premises under the decree obtained by the personal representatives of Dorman, was entitled to have and hold the premises conveyed to him by the referee free, clear and discharged from the lien of the mortgage mentioned in the complaint given by Masten and wife to Beers, as president, &c.

The following opinion was given by the justice, at the special term:

"WELLES, J. The revised statutes provide that when the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void. (1 *R. S.* 730, § 65.) The evidence establishes that the trusts created in and by the assignment of C. Masten to Dorman, Van Buren and Robinson, were not all executed at the time of the reassignment by the two surviving assignees to Masten. The decree or judgment in the suit by Dorman's administrators against Masten and the two surviving assignees, Van Buren and Robinson, shows that a considerable debt or liability to Dorman, the payment of which was provided for by the assignment, and being the same debt which the judgment in that case made chargeable upon the lands in question, was unpaid at the time of the reassignment, and has remained unpaid to the present time. The assignment was expressed to be in trust for the payment of debts. The reassignment was therefore, as between the parties to it at least, clearly in contravention of the trust, and void.

The real question in this case, and one in which I have

considerable difficulty, is whether under the circumstances the defendant and those whose interests he represents, are to be affected by the fact that the trusts were unexecuted. The reassignment, which was duly recorded before the consideration for the mortgage was advanced to Masten, recited that the trusts had been executed. It was given more than four years after the instrument creating the trusts was executed, and nearly two years after the death of Dorman. Masten, the assignor, was in possession of the premises in question, a part of the assigned property, from the date of the assignment, until his death in October, 1850, and no steps were taken by the assignees to disturb him or to dispose of this property. It is contended on the part of the defendant, that looking at the provisions of the assignment, and the nature of the property assigned, abundant time had elapsed to enable the assignees to complete the execution of the trust, and to show that if it was not executed even at the death of Dorman, they had been guilty of culpable negligence; that if under such a state of facts the presumption that the assignees had done their duty and fully executed the trusts would not arise, still when the surviving assignees declare the trusts executed, and reconvey the property, the plaintiff should be held precluded from setting up the contrary, as against a bona fide incumbrancer without notice, who may be presumed to have parted with his money and taken the mortgage upon the faith of the state of things referred to. Admitting the existence of these presumptions, I am nevertheless of the opinion that they are not conclusive, but may be rebutted and overthrown by evidence, which has been completely done. Dorman was a *cestui que trust* under the assignment, as well as a trustee. Not quite two years had elapsed after the assignment was executed, when he died. The moneys for which he was liable, and for which the decree was made, or some part of them, had not been paid at his death, but were paid afterwards by his administrators. The trust as to him ceased at his death, and passed to his co-trustees, but his interest as *cestui que trust* survived to his personal representatives. They commenced their suit in equity to have them ascertained and adjudicated, very soon after

the death of their intestate, and that suit was protracted by causes for which, so far as the papers show, they are not accountable, until 1852, and a short time before this action was commenced. When the Trust Company took their mortgage, or rather when they advanced their stock upon it, the records in the county clerk's office gave them notice that Masten held under the deed of reassignment by the assignees to him, and the law said to them, that if the recital in that deed, that the trusts were executed, was untrue, the deed was given in contravention of the trust, and was void. I incline to think, therefore, that they acted at the risk of that turning out to be the fact. If the mortgage had been given by the assignees and the consideration paid to them, it would probably have been a valid incumbrance if done in good faith on the part of the mortgagee, and provided also the terms of the assignment would authorize the assignees to raise money by mortgaging the trust property for the purposes of the trusts. In such case the person advancing the money would not be responsible for its proper application. But such was not this transaction. The money was not loaned to the trustees, but to Masten in his own right, and the mortgage given by him as security depended for its value as a security, upon his title to the property mortgaged, and that depended upon the reassignment by the surviving assignees to him, which has been shown to have been in contravention of the trust, and which the statute declares to be absolutely void.

The defendant's counsel contends that the utmost liability of the defendant is to pay the plaintiff the sum paid by him for the lands in question at the referee's sale: upon doing which the sale to the plaintiff will be null and void. But I do not think so. The plaintiff has either a complete legal title wholly discharged from the mortgage, or he has such title subject to the mortgage. I am not aware of any principle by which the defendant has the right to claim an equity of redemption.

There must be judgment for the plaintiff substantially according to the prayer of his complaint, but no costs to be allowed to either party as against the other."

A judgment was accordingly entered declaring and adjudging that the deed of release executed by Robinson and Van Buren, as surviving assignees, to Masten, was void as between the parties to this action, and all persons claiming or to claim through or under them, or either of them, subsequent to the commencement of this action. It was further ordered and adjudged that the defendant John J. Palmer, as special receiver of the North American Trust and Banking Company, be authorized and directed to execute and deliver to the plaintiff in this action, a good, valid and sufficient release in law, releasing and discharging the premises mentioned and described in the complaint, as the premises purchased by the plaintiff at the sale made by the referee on the 22d day of June, 1852, from the lien and operation of the mortgage executed by Cornelius Masten and wife to Joseph D. Beers, president of the North American Trust and Banking Company, bearing date the first day of November, 1838. And it was further ordered and adjudged that the said John J. Palmer, and all persons claiming or to claim under and through him, any interest, right or title to said mortgage, or the moneys intended to be secured by the same, subsequent to the commencement of this action, be perpetually enjoined from foreclosing the said mortgage, or in any way or manner enforcing or attempting to enforce the lien of said mortgage, so executed by said Masten and wife to the said Joseph D. Beers, against the said premises so directed to be released, or any part or parcel thereof. And it was further adjudged that neither party have costs as against the other party.

*B. W. Bonney*, for the appellant. I. The defendant holds the position of *a bona fide purchaser* (mortgagee) for full consideration paid, without notice; and is entitled to all the benefit and protection which that position affords. This is not questioned, and is expressly found by the court below.

II. The judgment appealed from rests upon two conclusions of law, stated by the justice before whom the action was tried, at special term; in both of which, as the appellant insists, there is error. (1.) The reassignment, dated 17th September, 1838

executed by Robinson and Van Buren, surviving assignees. to Masten, is not, as against this defendant, a conveyance in contravention of the trusts expressed in the assignment, and therefore is not void, as is supposed. (1 *R. S.* 730, § 65.) On the contrary, such reassignment purports to be and upon its face is in strict accordance with and a mere performance of the trusts of the assignment. (*Burrill on Assignments*, 494. *Brashear* v. *West*, 7 *Peters*, 608. *Halsey* v. *Whitney*, 4 *Mason*, 222, 3. *Lazarus* v. *Commonwealth Ins. Co.*, 19 *Pick.* 81.) The assignees, under the assignment in question, had full power to sell and convey the assigned property, or any part of it; and no purchaser was bound to ascertain the necessity of the sale, or to inquire as to the existence of unpaid debts, or to see to the application of the purchase money. In case of any misappropriation of the fund, the creditors must seek their remedy against the assignees. (1 *R. S.* 729, §§ 60, 66, 67. *Hill on Trustees*, 342, *Am. ed.* 2 *Story's Eq. Jur.* §§ 1127, 1131 *to* 1134. *Gardner* v. *Gardner*, 3 *Mason*, 178.) The assignees not only had the power, but it was their duty, after payment of debts, to reconvey the residue of the assigned property to the assignor, and the same rules and principles apply to a purchase made after such reconveyance as to a purchase directly from the assignees themselves. The assignees were the agents and trustees of the creditors entitled to the benefit of the assignment. If the creditors were not paid, the execution of the reassignment, with its recitals, was a fraud, the consequences of which must be borne by the creditors rather than by a *bona fide* purchaser. In this case there was nothing to put a purchaser upon inquiry as to the *bona fides* of the reconveyance, or to raise a suspicion that Dorman's debt had not been paid; on the contrary, all the circumstances were in favor of the integrity of the transaction. It was the duty of the assignees to sell the assigned property, and close their trust without delay, and full time had elapsed to raise the presumption that they had done so, and that the recitals in the reassignment were true. (*Burrill on Assignments*, 451. *Hart* v. *Crane*, 7 *Paige*, 37.) Dorman was a preferred creditor and also assignee, and the presumption that his debt

had been paid, especially, arose. Masten resided on and was in full possession of the premises in question, which, as in favor of a *bona fide* purchaser, against Dorman's representatives, is conclusive to support the reconveyance, and the title of such purchaser derived through it. If no conveyance had been found on the record, the facts of the case authorize the presumption that a reconveyance had been made. (*Hill on Trustees*, 556, 7, 8, *and cases there cited. England* v. *Slade*, 4 *Term Rep.* 682. 1 *R. S.* 726, § 62 *to* 67.) The fact that Masten remained apparent owner and in possession and occupation of the premises in question from the time of making the assignment, is, as against a *bona fide* creditor or purchaser, evidence of fraud in the assignment, unless the other assigned property was sufficient to pay all the debts of the assignor, as to which there is no evidence. (2.) The plaintiff in this action, by his purchase under the decree in the case of Dorman's administrators against Masten, &c. has acquired no title to the premises in question, as against the mortgage now held by the defendant as special receiver. The bill of Dorman's administrators against Masten, &c. was not framed or intended to reach this real estate or any part of the assigned property; and no notice of *lis pendens* was filed. The decree of the chancellor, under which the plaintiff's title (if any) is derived, gives no right to or interest in the premises in question, as against the defendant's mortgage. The proceedings under the chancellor's decree, the judgment of the supreme court founded thereon, and the sale and conveyance under such judgment, gave to the plaintiff no right or title beyond what was adjudged by the chancellor; and certainly none as against this defendant, who was no party to that suit.

III. The assignment under which the plaintiff claims was only a security for the payment of the debt alleged to have been owing by Masten to Dorman; and, so far as this real estate is concerned, was, in effect, a mortgage. The proceedings and sale in the suit of Dorman's administrators against Masten, &c. amount merely to a foreclosure of that mortgage. And, even if we admit that Dorman's representatives had the prior lien on the premises, the plaintiff's title, derived under said decrees

and sale, is subject to the defendant's right, as a subsequent incumbrancer not made party to the foreclosure suit, to redeem on payment of the amount bidden and paid by the plaintiff, ($100,) with interest from the time of payment. No demand was made on the defendant to redeem before the commencement of this action, and therefore the plaintiff cannot claim costs.

*D. B. Prosser*, for the respondent. I. The final decree or judgment of the administrators of Dorman against Masten, Van Buren and Robinson, is conclusive evidence of the following facts: The indebtedness of Masten to Dorman at the time of Dorman's death; that the payment of such indebtedness was secured and provided for in and by the deed of assignment made by Masten, bearing date 21st April, 1834; that such indebtedness remained unpaid at the time of rendering such final judgment or decree; that said debt was a lien upon the assigned property; and that the reassignment of Robinson and Van Buren to Masten, dated 17th September, 1838, was in *contravention* of the *trust expressed* in the said deed of assignment; and in fraud of the rights of Dorman and his estate. (*Candee* v. *Lord*, 2 *Comst.* 269.)

II. The release or reassignment from Robinson and Van Buren, the surviving assignees, to Masten having been made before the trust created in the deed of assignment had been executed, leaving the debt due to Dorman or his estate unpaid, was in *direct contravention* of such trust, and therefore *absolutely void;* hence no title passed to Masten thereby. (1 *R. S.* 730, § 65. *Cruger* v. *Jones*, 18 *Barb.* 467. *Chitty on Contracts*, 229. 6 *Taunt.* 369.)

III. The defendant occupies the same position and relation as the mortgagee, and is entitled to the same, but no greater equities. The assignment having been recorded long before the mortgage in question was executed, the record thereof was constructive notice to the mortgagee, that Masten had no interest which he could mortgage. (12 *John.* 343. 1 *Selden*, 301. 1 *Howard's Appeal Cases*, 475, 476, 477 *and cases there cited.*) The omission of the clerk to notice the assignment in his cer-

tificate of search of title, upon which the mortgagee acted in taking the mortgage, cannot affect or prejudice the rights of the plaintiff under the decree.

IV. The recital in the release or reassignment "that the trust had been executed &c.," is not even *prima facie* evidence of that fact as against the plaintiff, for the following reasons: (1.) The plaintiff does not claim through this release, but in hostility thereto. (2.) Recitals are only evidence against the parties, their privies, or those claiming under or through the instrument containing the recital. (3.) Recitals are no higher evidence than the declarations of parties by which they may be estopped.

V. The defendant in his answer does not claim that the *trust had been executed.* To avail himself of such a defense it should have been set up in the answer; nor is he entitled to the benefit of any presumption arising from the lapse of time. Presumptions are only allowed to prevail where it is the duty of some party or person to do an act, the omission of which would amount to a wrong; and no presumption can in *any case* be allowed to prevail, where the proof, as in this case, is *positive* that the *trust had not been executed.* Presumptions are never allowed where the proof establisbes the thing to the contrary. It is only in the *absence* of proof that presumptions are resorted to.

VI. The defendant has not by his answer put himself in a situation to avail himself of the defense, that from the lapse of time and the other facts in the case, the mortgagee had a right to *presume* the trust executed, for he *denies notice* of the assignment *in fact;* and so far as the evidence in the case goes it shows that he took the mortgage without notice, *in fact,* of the assignment; if so, it follows that there was no presumption whatever for him to act upon. He could not presume a trust executed of which he had no knowledge.

VII. The personal representatives of Dorman cannot be affected by the acts or omissions of the surviving assignees, after the death of Dorman. Had the surviving assignees, after Dorman's death, *wholly renounced* the trust, and reconveyed the

asssigned property to Masten, still the property would remain liable for the debts of Masten, provided for in his assignment, into whose hands soever the same might pass. (4 *John. Ch.* 136. *Cruise's Dig. vols*, 1, 2, *ch.* 4, § 1, *subd.* 8, *p.* 488. 1 *McCord's Ch.* 132. 2 *John. Ch.* 343. 7 *Barb.* 354. 1 *Seld.* 301. 3 *John. Ch.* 344. *Story's Eq. Jur.* § 400.)

VIII. The judgment of the court directing a release of the mortgage and enjoining the foreclosure thereof, is in accordance with the well settled principles of equity. (*Nicol* v. *The Town of Huntington*, 1 *John. Ch.* 166. *Apthorp* v. *Comstock*, 2 *Paige*, 482. *Pettit* v. *Shepherd*, 5 *id.* 493. *Van Doren* v. *The Mayor &c. of New York*, 9 *id.* 388.)

*By the Court*, JOHNSON, J. The assignees of Masten held the real estate in question in trust to sell for the benefit of creditors. The trust was expressed in the assignment, by which the estate was created, and vested in the assignees, and is one authorized by statute. The assignees, the moment they took the assignment, became trustees for the creditors, with power to sell and convey the real estate for their benefit, but with no power to convey for any other object or purpose, so long as the trust created remained undischarged. The statute declares that every conveyance made in contravention of the trust expressed in the instrument creating the estate shall be "absolutely void." (1 *R. S.* 730, § 65.)

The reconveyance, by the trustees, of the real estate embraced in the assignment, without paying and satisfying the debts for the payment of which the estate was created, was clearly in contravention of the trust. It was directly in opposition to the trust, and calculated, if not intended, to obstruct and defeat it, and falls clearly within the plain language and meaning of the acts. The conveyance must therefore be adjudged absolutely void, at least as to all creditors whose debts were provided for by the instrument creating the estate, and which remained unpaid at the date of such conveyance. By the assignment Masten, the assignee, divested himself of the entire estate in the lands in question, retaining nothing except

the equitable and incidental right to discharge the trusts by payment of the debts before sale, and thus entitle himself to a reconveyance of the whole estate, or to claim a reconveyance of the residue remaining unsold after the debts were discharged, or payment of the residue of the proceeds of the sales. The conveyance from the trustees being void, Masten had at the date of the defendant's mortgage, no title or interest in the land, which he could convey or encumber by a mortgage, at least against creditors interested in the trust estate. It may be that such a conveyance would be good against all persons except creditors. And I am inclined to the opinion that it would be, notwithstanding the peremptory language of the statute The statute declares that all conveyances of lands by a person not in possession, which are at the time held adversely, shall be void, and yet courts have uniformly held that such a conveyance was good as between the parties, and conveyed the title of the grantor, as against all the world except the adverse holder. (*Livingston* v. *Proseus*, 2 *Hill*, 526. *Kenada* v. *Gardner*, 3 *Barb. S. C. R.* 589.) So here, I apprehend, had no creditor interposed his claims, the title of Masten thus derived from the assignees, would have been good as against all persons. But this does not, that I perceive, affect the question here, in a contest between a person claiming title under and in consonance with the trusts created by the assignment, and an incumbrancer of the title attempted to be conveyed in contravention of such trusts. The plaintiff's title must be adjudged to stand upon the same footing with one derived directly from the assignees by a sale and conveyanee in pursuance of the trust. The trust was in nowise affected by the reconveyance, and it was the duty of a court of equity, when its aid was invoked, to compel its execution.

The validity of the mortgage is in no way helped, by the fact that the mortgagee at the time of taking it had no actual notice of the claim of the Dorman estate, or of the assignment and reconveyance. The assignment and reconveyance were both matters of record, which the statute makes sufficient notice to all subsequent purchasers and incumbrancers. Hav

ing constructive notice of the assignment they were put upon inquiry as to all claims and rights under it. Nor is the recital of the assignees, in the reconveyance, that the debts were all paid, of any avail. The trustees could not by a recital in a deed of that character, contrary to the fact, affect the interests of *cestuis que trust*. They were put upon inquiry as to the facts, and it is no answer for them to say that they did not ascertain the true state of the case. The law imputes to them full knowledge of all the facts, and their mortgage must stand or fall by the state of facts actually existing at the time. The trustees have not the power to deprive the *cestuis que trust* of the protection of the statute by an erroneous statement. The risk was with the mortgagees as it is with all purchasers under a power.

I am not aware of any principle which would allow the mortgagees, or their assigns, to redeem the real estate by payment of the amount at which it was bid off at the sale under the decree, or, in short, to redeem at all. The mortgagor having no title could create no incumbrance upon the estate. The mortgage could at most only operate as an assignment or equitable mortgage of Masten's residuary interest after the trust was fully executed. Under this the defendant might probably have paid the debt before a sale and transfer of the title. But the title having passed in pursuance of the trusts created, there can be no redemption by any one standing in the position of the assignor, or claiming under him, subsequent to the creation of the trust estate. Their claim must now be upon the residuary portion of the avails of the sale, if any. I do not see how the defendant could redeem, even by paying the whole debt. But this he does not propose to do.

I think there was no error either in the rulings or in the judgment at the special term, and that the judgment should be affirmed.

[Monroe General Term, September 3, 1855. *Selden, T. R. Strong* and *Johnson*, Justices.]

## MURDOCK and DALL *vs.* HARRIS and others.

20 407
18a 28

Looms, placed upon the floor of a woolen factory and fastened to such floor by means of screws in each loom, are a permanent and essential part of the woolen factory. And in the absence of any proof that when they were thus annexed to the building it was not intended they should remain indefinitely in their position, to be used as long as they were capable of use, it will not be presumed that the annexation was merely temporary. They are therefore to be deemed *fixtures*, as between mortgagor and mortgagee.

And a mortgagee of the factory and machinery will hold such looms, by virtue of his mortgage, in preference to a creditor of the mortgagor, who has levied upon the same under an execution issued against the latter; especially in a case where it appears that the parties to the mortgage have treated the looms as fixtures, and intended they should be covered by the mortgage.

THIS was a motion by the defendants, Gifford, Sherman & Innis, for a new trial, upon exceptions taken by them at the circuit, and which exceptions were directed to be heard in the first instance at a general term. The action was brought to foreclose a mortgage given by the defendants Harris & Watermen, on the Auburn Woolen Mill property and machinery, to the plaintiffs, dated November 8, 1853, to secure the payment of $20,000 in one year, with semi-annual interest. The defendants, Gifford, Sherman and Innis, recovered judgments against said Harris & Waterman, on the 24th October, 1854, amounting to $3384.13, and executions were issued on the same day, and delivered to the sheriff of the county of Cayuga, who on the 8th day of November, 1854, levied said executions on twenty-five broad looms in said woolen mill. Said defendants claimed the right to hold the looms for the satisfaction of their executions. The judge before whom the action was tried decided that the looms were fixtures, and were to be regarded as real estate, and not personal estate; that the facts set forth in the answer of the defendants did not constitute any defense to the action; and that the plaintiffs were entitled to judgment against the defendants.

*John Porter*, for the plaintiffs.

*J. Underwood*, for the defendants.

*By the Court*, JOHNSON, J. I shall not attempt to go over the numerous cases to be found in the books upon the vexed question of what confers upon machinery, when put up and attached to a building for use, the quality, and gives it the character, of real estate. The task would be unprofitable and well nigh endless. Upon the plain undisputed facts presented by the pleadings in the case, I am clearly of the opinion that no defense is made out to the cause of action alleged in the complaint. The plaintiffs are the mortgagees of the owners of the woolen factory and premises, seeking to foreclose their mortgage, on account of default in making payments. The mortgage embraces the machinery in terms, and it is indisputable that the parties to the mortgage have treated the looms in question as fixtures, and intended they should be covered by the mortgage. The defendants who appear and put in their answer, are subsequent judgment creditors of the mortgagors, and before the commencement of this action had caused execution to be issued and levied upon twenty-five broad looms, in the factory, which are included in the plaintiffs' mortgage. And they seek by way of defense to have the plaintiffs enjoined and restrained from selling the looms thus levied on, as real estate, by virtue of their mortgage, and to have preference and priority given to their execution, on the ground that the said looms are personal and not real estate, the plaintiffs' mortgage not having been filed or indexed as a chattel mortgage. The answer alleges that the looms are placed upon the floor of the factory building and are fastened to said floor by means of ten screws in each loom, merely for the purpose of keeping the said looms in their places and in a steady position, and not otherwise, during the operation and working of said looms. Such are the conceded facts of the case. It is obvious that these looms, thus affixed, had become and were, at the time the mortgage was executed, a permanent and essential part of the woolen factory. They were thus attached at that time, and there is nothing in the case to show that when they were thus annexed to the building it was not intended they should remain indefinitely in their position. to be used as long as they were capable of use. They were part of

the structure, essential to the use for which the whole was designed. And it is not to be presumed that the annexation was merely temporary. Permanence and steadiness of position were indispensable to their usefulness; and to allege that they were thus attached merely to keep them steady, proves nothing, except that they were secured so as to become efficient and useful portions of the factory. The means by which they were attached is shown, and from the nature and character of the annexation I think it follows as matter of law, that they were fixtures, as between mortgagor and mortgagee. It does not follow at all that they were not fixtures, because the screws could be taken out and the looms be thus separated from the floor and removed without essential injury to them or to the building, as is alleged to be the fact in the answer. It is immaterial whether the iron is in the form of a spike or nail or screw. The attachment would be just as permanent with the one as the other, and the same allegation might be made as to detachment without essential injury in either case. The character, nature and object of the annexation, taken in connection with the thing annexed and the surrounding circumstances, must control. I am therefore of opinion that the decision of the judge at special term was correct and that a new trial should be denied.

[Monroe General Term, September 3, 1855. *Selden*, *Johnson* and *T. R. Strong*, Justices.]

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## Briggs *vs.* Smith.

20 409
42 39
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30h 31
114a 263

*Mistakes* or *errors* of arbitrators, in respect to the matters submitted to them, cannot be inquired into, or corrected, in a court of law. Parol evidence cannot be received, therefore, to show such mistakes or errors.

But parol evidence to show that the arbitrators *exceeded their powers* is admissible in a court of law; and if that fact is proved, it will render the award void.

Thus where a submission was general, of all matters whatever *between the parties*; Held that evidence to show that the arbitrators took into consideration

matters not submitted to them, viz: matters between one of the parties and a third person, was admissible.

And where that portion of an award which is void for not being within the submission, is so connected with the rest of the award that it is impossible to distinguish between the valid and the invalid portions, the whole award is void.

Where, in an action upon an award, the defendant offered to prove by one of the arbitrators, "that the arbitrators took into consideration matters not submitted to them; also that they included in the award about fifteen perch of stone as the property of the defendant, and did not include it in the written award;" *Held* that this was not to be construed as one entire offer and therefore inadmissible as embracing a matter as to which no evidence could be received, viz: to show the mistake; but that the proposition was to be treated as constituting two distinct offers, one of which was proper.

Where an objection to testimony is taken, on the trial, on a specific ground, and in such a manner as to induce the opposite party to believe that such is the sole ground, the party objecting will not be allowed, on appeal, to place his objection upon a different ground and one which, if it had been urged at the trial, might have been obviated.

Where there is not enough on the face of an award to show that the arbitrators did not go beyond the submission, parol evidence may be resorted to. And the arbitrators, or either of them, are competent witnesses to prove that matters were included in the award which were not contained in the submission; in a case where no bad faith on the part of the arbitrators is alleged.

THIS was an action originally tried before a justice of the peace of Saratoga county. The action was brought on an award of arbitrators, which award was in writing and produced in evidence, by which among other things, the arbitrators awarded that the defendant should pay the plaintiff $35 in sixty days and one-half the fees of the arbitrators, the whole being $15. The justice, on proof of the award and of the payment of the arbitrators' fees by the plaintiff, rendered judgment in his favor for the amount of the award and one-half the fees, amounting to $42.16 damages, and $2.09 costs. On the trial the defendant offered to prove by Jacob Osborn, *one of the arbitrators*, "that the arbitrators took into consideration matters not submitted to them; also that they included in the award about 15 perch of stone as the property of the defendant, and did not include it in the written award; and admitted with the offer that no bad faith on the part of the arbitrators was imputed. This was objected to by the plaintiff, on the ground "that the evidence to prove the offer is incompetent; that an arbitrator is incom-

retent to impeach his award." The justice sustained the objection, and the evidence was excluded. The defendant appealed to the county court of Saratoga county, where the judgment was affirmed, and he appealed to this court.

*H. W. Merrill*, for the plaintiff.

*John Lewis*, for the defendant.

*By the Court*, C. L. ALLEN, J. The only question presented in this case is, whether the evidence offered by the defendant should have been received. The evidence offered was two-fold in its aspect, 1. That the arbitrators took into consideration matters not submitted to them; and 2d. That they awarded that the defendant should have as his own property about fifteen perch of stone on the premises of the plaintiff, which through mistake was not included in the written award. It is not seriously contended that the latter offer was proper. It has been repeatedly held that no evidence of any kind can be given to *show a mistake in the award*, in an action at law upon it. (*Efner* v. *Shaw*, 2 *Wend.* 567. *Newland* v. *Douglass*, 2 *John. Ch.* 62. 9 *John.* 212. *Doke* v. *James*, 4 *Coms.* 567, 574. *Perkins* v. *Wing*, 10 *John.* 143. 12 *id.* 311. *Emmet* v. *Hoyt*, 17 *Wend.* 410. *Fidler* v. *Cooper*, 19 *id.* 286, 287. *Dater* v. *Wellington*, 1 *Hill*, 319.)

The other part of the offer presents a more serious question. In the case of *Butler* v. *The Mayor &c. of New York*, (7 *Hill*, 329,) which was a case in the court of errors, it was held that oral evidence may be given to invalidate an award by showing that the arbitrators exceeded their powers, though the submission and award be in writing and under seal. It was remarked that if the submission had been pursuant to the statute respecting arbitrations there is no doubt a court of law would have the power of vacating the award summarily on motion; but that such a mode of relief only obtained where by the agreement of the parties judgment might be rendered in a court of law upon the award made pursuant to the submission; but that in other

cases, that relief could be given in a court of law as well as in equity. That the evidence offered did not propose to *vary the written terms of the award*, but to show that the arbitrators did award as to matters not submitted to them; and it was said to be analogous to the case of a special power of attorney, where oral evidence may be received to show that the act done was not within the scope of the attorney's authority. That *the award of arbitrators* is conclusive and absolute except in the specified case of misconduct, *or where they exceed their power.* "It would seem," say the court, "like a denial of justice, where arbitrators have transcended their powers, that the party shall be precluded from giving any proof, and be bound to submit, merely because the arbitrators have not made such a defect of authority apparent upon the face of the award."

In another report of the same case, (1 *Barb. S. C. Rep.* 325,) this doctrine is again repeated and affirmed, and the court say that such an award is a nullity and may be so declared by *any court* before which an attempt is made to enforce it.

In the *Matter of Williams*, (4 *Denio*, 194,) it was decided that on a motion to vacate an award under the statute, (2 *R. S.* 542, § 10,) the court is not confined to an examination of the submission and the award, but may receive affidavits, as to what took place at the *hearing*, to *show that the arbitrators exceeded their powers;* and Bronson, Ch. J., in delivering the opinion of the court, remarks that in actions involving the validity of an award, "the rule in this state was formerly understood to be that you could not impeach the award by going behind it, and showing that the arbitrators exceeded their authority, or omitted to decide on all the matters submitted, and that this rule was followed by the supreme court in *Butler* v. *The Mayor &c. of New York.* But that on the reversal of that judgment by the court of errors, (7 *Hill*, 329,) the rule was settled the other way, and that now the parties may go behind the award, and if that can be done in an action it is quite clear that it may also be done on a motion to vacate the award; and the award was vacated because the arbitrators had exceeded their powers."

As early as 1840, in the case of *Elmendorf* v. *Harris*, (23

*Wend.* 628,) the court of errors decided that an award made without notice of hearing to the losing party is void, and that such a defense could be set up in an action at *law* upon the bond, without the party's being compelled to resort to a court of equity. The want of notice was in this case proved by *parol*, it not appearing upon the face of the award. The point was passed upon and decided, that parol evidence may be resorted to in an action on the bond, to show the want of notice, as the supreme court whose judgment was reversed placed their decision upon the ground that if the person dissatisfied with the award wishes to amend it for any matters *dehors* the award, he cannot do it in a court of law. (*S. C.* 5 *Wendell*, 516, 520; *opinion of Ch. J. Savage. And see* 6 *Cowen*, 103; 8 *Pet.* 178.)

It has thus been the law, in this state at all events, since the decision of *Butler* v. *Mayor &c. of New York*, (7 *Hill*, 329,) that parol evidence to show that the arbitrators exceeded their powers is admissible in a court of law, and that if proved it renders the award void. It has not been doubted, unless in the recent case in the court of appeals of *Doke* v. *James*, (4 *Comst.* 567, 576.) In that case the arbitrators made two awards in writing, one dated 25th of February, 1848, in which they directed their own costs and expenses, amounting to $63, to be paid by the plaintiff Doke. In the other, under date of 6th March following, they stated their expenses at $63, but did not direct that Doke should pay them. The plaintiff's counsel offered to prove by one of the arbitrators that the award dated 25th March, 1848, did not, in fact, contain the decision of the arbitrators; that it was signed by them without understanding its meaning and effect, and that they had been induced to sign it through false representations; and that on ascertaining that they had made a mistake the arbitrators again assembled and made the second award. This evidence was objected to, both on the ground of the incompetency of the evidence, and of the inability of the arbitrators to impeach their own award; but it was admitted by the court below, and the defendant excepted. The case shows that the first award, after objection on the part of one or two of the arbitrators against the clause re-

quiring Doke to pay their fees, was finally signed and sealed by all of them and delivered to the plaintiff. The award of 2d March was only signed by two of the arbitrators. The court remark that the award of 25th February *upon the matters submitted* was conclusive between the parties until set aside, and no parol testimony, not even of the arbitrators, was admissible to contradict or impeach it. They decided that the arbitrators had exhausted their powers by the first award, and could not make another unless by consent of parties. I do not consider this decision as overriding or attempting to override that of the court of errors in *Butler* v. *The Mayor &c. of New York.* That case is not alluded to by Justice Mullett in his opinion, and he confines his remarks to the *matters submitted;* that is, not that the arbitrators exceeded their powers, but that they had made and published one award, on the *matters submitted,* and could not be allowed to alter or explain it by attempting to make another, or by showing that they had awarded more than they intended, or had made a mistake. The cases cited by Justice Mullett in his opinion, most of them, were cited in the case of *Butler* v. *The Mayor &c. of New York,* and in the *Matter of Williams,* but were virtually overruled, by the court of errors, in the former case, and by the supreme court in deciding the latter case, so far as the point under consideration is concerned. The attention of the court of appeals, or of the learned judge who delivered the opinion, does not seem to have been directed to the case of Butler, and I am confident from a review of the facts, in the case in 4 *Comst.* and of the cases relied upon in support of the decision, that it was not the intention of the court to reverse or overrule the decision of the court of errors. The case of *Emmet* v. *Hoyt,* (17 *Wend.* 410,) decides no more than that mistakes or errors in law or fact upon the matters submitted cannot be reviewed in a court of law, but virtually admits that where there is a want of jurisdiction on the part of the arbitrators, (and excess of power is want of jurisdiction,) then the award is not final. That case merely involved a consideration of the merits, and all the matters sought to be re

viewed were *fairly within the scope of the submission*, and the court said they could not interfere.

So in the case of *Fidler* v. *Cooper*, (19 *Wend.* 285,) the court say, "An award, properly made in pursuance of the authority conferred on the arbitrators, is conclusive as to all matters to which the submission extends, whether any particular matter included in the submission was laid before the arbitrators or not," and they cite *Wheeler* v. *Van Houten*, (12 *John.* 311,) which case is that on a submission to arbitration of all matters in difference between the parties, the award is conclusive on the parties as to all causes of action subsisting between them previously to the submission; that is, the award is *final* as *to all matters within the submission.* So in *Dater* v. *Wellington*, (1 *Hill*, 319,) the court expressly said that whether the arbitrators erred on the *merits*, as a court of law they had no right to inquire, but if the questions had related to the power or jurisdiction of the arbitrators, they *could inquire.*

All these cases seem to admit the doctrine, which was set at rest in Butler's case, and decide just as clearly that mistakes or errors in the arbitrators as to the matters submitted to them, such as was attempted in the latter part of the defendant's offer in this case, cannot be inquired into or corrected in a court of law. It is remarked by the court in *Doke* v. *James*, that if the arbitrators did award as to matters not submitted to them, the award would only be void *pro tanto*, and would stand good as to the matters confessedly submitted. The learned justice cites, in support of that part of his opinion, *Martin* v. *Williams*, (13 *John.* 264.) That case decides that where part of an award which is void is *not so connected* with the rest as to affect the justice of the case, the award is void only *pro tanto;* but where it is so connected it is void altogether. The case of *Jackson* v. *Ambler*, (14 *John.* 96,) decides nothing farther, but affirms the doctrine that if it had appeared that the arbitrators had exceeded their powers, the court would have been bound to deny to their decision any valid effect. Such is the conclusion, and no more, in *McBride* v. *Hagan*, (1 *Wend.* 326, 360.) The submission in this case, which was in writing, was a general one of all matters whatever *between the parties.* The offer

was to take into consideration matters not submitted to the arbitrators; and the parties both say in their points, that they took into consideration matters in difference between Reuben Perry and the defendant. It is impossible to determine from the award how much the arbitrators allowed was due from the defendant to the plaintiff, and how much was allowed as to the matter in which Reuben Perry was interested. It is impossible to distinguish so as not to affect the justice of the case; and within the decisions the award, if the facts offered to be proved were true, is wholly void. I think, on the whole, that the evidence, if it was properly offered, should have been received.

But the plaintiff objects that the offer as a *whole* was improper; that no evidence could be received to show the *mistake*, and as both matters were included in one offer, the evidence applied to both matters equally, and should have been received as a whole, and rejected as a whole. It has been conclusively shown, I think, that the evidence as to the mistake was improper and was rightly rejected. I doubt, however, whether it can be said that both matters were included in one offer. It is true, they were made in *consecutive* order, but it does not follow from that, that they were both *one* offer. The offer was in these words, "Defendant offered to prove by Jacob Osborn, one of the arbitrators, that the arbitrators took into consideration matters not submitted to them; (semicolon) *also* that they included in the award about 15 perch of stone," &c. through mistake. Now there is a pause between the two matters, making it pretty evident that these were intended to be two distinct offers. The defendant first offered to prove, 1, that the arbitrators exceeded their powers; *also*, 2, that they made a mistake in their award. Like the two counts in a complaint, where it has been held that in commencing a second count, it is sufficient to use the word *also*. It is very easy to distinguish between the two offers, and to pass upon each, and the offer, especially in a justice's court, where pleadings and offers are to be construed liberally, was sufficient unless specifically objected to. It is true it would probably have been more satisfactory and at least more decisive if the justice had been requested to decide and had decided, on each offer dis-

tinctly; but I apprehend they were so stated as to make them two distinct offers. The offer embraced two distinct propositions, each of which was easily distinguishable, and each was in such plain, unequivocal terms, as to leave no room for doubt as to what was intended. (*Duniels* v. *Patterson*, 3 *Comst.* 47, 52.) They did "fit the case" nearly enough, and as far as intended in 1 *Peters*, 328, 337. The counsel for the plaintiff, while he insists that the matters were all embraced in one offer, relies upon his objection to their admission on two grounds; first, that the evidence to prove the offer was incompetent, and second, that an arbitrator is incompetent to impeach his own award, and yet his objection is obnoxious to the very exception which he takes to the defendant's offer. It is in these words: "Objected by plaintiff that the evidence to prove the offer is incompetent; that an arbitrator is incompetent to impeach his own award," and the court returns "*objection sustaincd.*" According to his mode of arguing, the objections would all be included in the one sentence, and then it would stand based upon the specific ground that an *arbitrator* was *incompetent* to impeach his own award. It might be urged with the same force, that he was bound to make his objection more specific, if he intended to rely on any other ground than the one last stated. And it is more than probable from the phraseology in the return, that the justice rejected the evi lence on that ground alone. None other is stated or pretended, and the fair inference is, no other was interposed or passed upon. If the objection had been put upon the ground that the offer embraced too much, the defendant would have had an opportunity to make them more separate and distinct. But the defendant by his stating in the latter part of his objection the only ground, probably misled the plaintiff, and should not now be permitted to change his ground and for the first time start a new one. The objection was not to the evidence, but to the means of proving it. In the case of *Harger* v. *Edmonds*, (4 *Barb.* 256,) the offer was to show that the waterworks were not put in repair after the commencement of the suit and were not in repair after the 1st January, 1847. This was one connected proposition to prove two connected facts, one

of which was inadmissible. In the case we are now considering they were separate facts not connected with each other, and separately stated. In *Beebee* v. *Bull*, (12 *Wend.* 504,) cited by the learned judge in the court below, the supreme court put their decision upon the very ground that the objection was too broad. "*A part of the evidence*" say the court, "*was clearly competent, but the objection went to the whole, and was properly overruled.*" I think that case decides the present, so far as the point now considering is concerned, but in a different way from that supposed by the court below. Here, the party took his objection in such a manner as to place it entirely upon the ground that the witness could not be sworn to impeach his own award, or at all events so as to induce the opposite party to believe, as he evidently did, that such was his sole ground. He now seeks to change his ground, and defeat his adversary upon an objection which, if it had been taken at a proper time, on the trial would have been obviated. This, in my judgment, he is not at liberty to do, and so are many of the cases. (*Bank of Salina* v. *Henry*, 2 *Denio*, 155. 8 *How.* 151.) The last case decided on this subject, and which is, I think, directly in point, is that of *Newton* v. *Harris*, (2 *Seld.* 345.) The court say, where an objection to testimony on a specific ground is made at the trial, no other ground of objection which could have been obviated, will be listened to on appeal. Had the objection been put originally on the ground urged on the appeal, the phraseology of the defendant's offer might perhaps have been modified. Even if the objection is vague or doubtful, it is too broad to be of any avail in the appellate court. (*Id.* 357.) Indeed this principle is too familiar with all to need further illustration or authority.

The only remaining question is whether the arbitrator was a competent witness to prove that matters were included in the award not contained in the submission. Arbitrators, (like jurors as to their verdict,) are not to be permitted to impeach their award. And the chancellor said in *Campbell* v. *Western*, (3 *Paige*, 128 137,) that an arbitrator who has signed an award cannot be allowed to contradict his solemn act, and to say that he did not

conour in it, any more than a juror who has concurred in a general verdict would be permitted to swear he was not convinced it was right. In *Butler* v. *The Mayor &c. of New York*, (1 *Barb. S. C. R.* 325, 334,) before cited, the court remarked that where there was not enough, on the face of the award, to show that it did not go beyond the submission, parol evidence might be resorted to, and that the arbitrators or either of them were competent witnesses to prove that fact; unless *mala fides* should be alleged. Here the defendant expressly stated when the offer was made, that no bad faith on the part of the arbitrators was imputed. In such cases the evidence of arbitrators has often been admitted to show that they did or did not take into *consideration* any particular subject matter. And in the *Matter of Williams*, (4 *Denio*, 196,) the affidavits of the arbitrators were allowed, to show that the arbitrators exceeded their authority. These authorities seem to settle the question in favor of the competency of the witness.

The judgment of the county court and of the justice should be reversed.

[Franklin General Term, September 4, 1854. *Hand, Cady, C. L. Allen* and *James*, Justices.]

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## In the matter of the petition of the New York Central Rail Road Company.

The existence of a *mortgage* which is a lien upon land taken and used by a rail road company for the purpose of constructing and operating its road, is one of the *defects* in the title to such land, contemplated in the 21st section of the general rail road act of 1850, so as to authorize such company to proceed anew to acquire a valid title, in the same manner as if no appraisal had been previously made, nor any attempt to procure the title by agreement and purchase

The company is not obliged to wait until the mortgaged premises are sold under a decree of foreclosure; but on discovering the existence of the incumbrance they may proceed immediately, and on complying with all the provisions of the act, may have the lien extinguished, as to the land occupied by them

Matter of the New York Central Rail Road Company.

THIS was an application for the appointment of commissioners to ascertain and appraise the compensation to be paid to the owners or persons interested in certain real estate which had been taken for the use of the Schenectady and Troy Rail Road Company before its consolidation with the New York Central Rail Road Company. The petition set forth the act of incorporation of the former company, and alleged that they did, pursuant to said act, construct their railway. That the lands mentioned in schedule A, annexed to the petition, were necessary for, and required by, the Schenectady and Troy Rail Road Company for the purposes of its incorporation, and that on the 7th day of May, 1841, John Mallany was in possession of the land in said schedule described as parcel No. 1, claiming to own the same, clear and free from all incumbrances; and that, believing said claim to be well founded, the company paid Mallany $500 therefor, being the full value, and took from him a warranty deed in fee for said parcel, on that day. That on the 17th of May, 1841, John Whittick was in possession of the land described in the schedule as parcel No. 2, claiming to own the same in fee; and that believing said claim to be just, the company, on that day, paid him $410 therefor, being the full value, and took a warranty deed from him. And that on the 29th day of April, 1841, Peter D. Van Vranken was in possession of the land described in the schedule as parcel No. 3, claiming to own the same in fee, clear of incumbrance; and that the company, believing his claim to be well founded, paid him therefor $85.75, the full value, and received a warranty deed from him in fee, for said premises. That in the spring of the year 1841, the company entered into possession of said several parcels, under said deeds, as their own property, and constructed their road thereon, at great expense; and that said lands had ever since said spring of 1841 been and still were used under said deeds for rail road purposes. That the length of said rail road was 21 miles; of which a map and survey was made and filed in January, 1840. That on the 28th of January, 1841, the road was located and the location in writing was filed as required by law. That the capital stock of the company was $650,000, which was all su'

scribed and paid in in good faith. That immediately after the purchases aforesaid the rail road was constructed from Schenectady to the west bank of the Hudson river, by said company, and had ever since been and still was used through its entire extent, for rail road purposes. That it was so used by said Schenectady and Troy Rail Road Company until its consolidation with the New York Central Rail Road Company, pursuant to the act of April 2, 1853, on the 7th day of July, 1853, since which time the latter company had possessed and owned all the real and personal property, and exercised all the rights, privileges and franchises which before then belonged to the said Schenectady and Troy Rail Road Company. That in the year 1846, one Charles A. Peck, now of the city of New York, as administrator with the will annexed of Thomas Tom deceased, filed his bill of complaint in the then court of chancery of the state of New York, against the said Mallany, Whittick and Van Vranken, to foreclose a mortgage covering the lands mentioned and described in said schedule A, and other lands, which mortgage was made by Elias Kane, late of the city of Albany, deceased, and Deborah his wife, to Thomas Bloodgood, acting executor of Thomas Tom, deceased, on the 1st day of May, 1817. That said Schenectady and Troy Rail Road Company and others, believing that said mortgage had been satisfied, interposed defenses against the same as they were advised were proper; and that said action to foreclose was transferred from court to court until it was brought into the court of appeals and there argued, and which court decided the same in December, 1853, and not only decided that said mortgage was a valid *lien and incumbrance* upon the lands mentioned and described in said schedule A, and in part unsatisfied, but in effect that the heirs at law of the said Elias Kane, deceased, had still an interest in said premises, and that the title of the Schenectady and Troy Rail Road Company and that of the petitioners was defective; that they had therefore failed to obtain a perfect title to said lands mentioned in said schedule, and that they were required by the petitioners for the purpose of constructing and operating their road; and that they had not been able to acquire a perfect title to the said

lands, for the causes above set forth. That Charles A. Peck administrator, Thomas T. Bloodgood, executor, and various other persons and parties named in the petition, *had or claimed to have*, as the petitioners were informed and believed, some interest in the said lands, as owners or incumbrancers or otherwise. They therefore prayed that commissioners might be appointed and that they might be permitted to continue in possession in the mean time, and that all actions and proceedings against them might be stayed.

Copies of the petition and notice were served upon all the parties named in the petition. Charles A. Peck appeared to oppose the motion, and his counsel read the affidavits of Mallany, Van Vranken and Sarah Whittick, and the answer of the Schenectady and Troy Rail Road Company in the suit of Peck against that company, which he claimed showed a good adverse possession under the sheriff's deed to Whittick and Foster as against the heirs at law of Elias Kane, which barred their legal title to the premises. The parcel of land purchased from Peter D. Van Vranken was not covered by the mortgage. It appeared that the court of appeals decided that the mortgage was valid upon its execution; that the part of the premises conveyed by Kane and wife to Peter A. Van Vranken was released from the lien of the mortgage; that the sheriff's deeds to Whittick and Foster were and are void for uncertainty, and that the *defendants* who claimed estates under the said deed did not take and had not any title derived therefrom, and that said premises were subject to the lien of the mortgage, which had not been paid or extinguished. A bill of amendment and supplement was filed in the supreme court, and a decree finally entered in conformity with the decision of the court of appeals, ordering among other things, the premises in the possession of the petitioners to be sold, in the inverse order of alienation.

*Townsend & Kellogg*, for the petitioners.

*P. Potter* and *A. C. Paige*, for Charles A. Peck.

Matter of the New York Central Rail Road Company.

*By the Court*, C. L. ALLEN, J. The Schenectady and Troy Rail Road Company, in procuring title to lands under their organization and act of incorporation, obtained the deeds for the parcels of land contained in schedule A, at the times and in the manner and for the consideration stated in the petition. They supposed and believed at the time, that they obtained a good and perfect title, and went on and constructed their rail road at a great expense, over the lands thus purchased, and remained in possession, under claim of title, till the filing of the bill to foreclose the Kane mortgage. They interpose among other things the defense of payment of the mortgage, and their title thus acquired. The court of appeals determined and decided that the mortgage was not paid; that it was a good and valid lien upon the premises to which they supposed they had acquired title, except as to the part conveyed to Peter A. Van Vrancken; that the sheriff's deed through which the plaintiffs and those under whom they claimed derived title were void for uncertainty; and a decree is now in force in the supreme court, in obedience to that decision, ordering a sale of these premises under that mortgage, upon which it is adjudged there was due at the time of the entry of the decree, in April last, the sum of $18,771.16. The petitioners claim that the Schenectady and Troy Rail Road Company entered upon and took possession of those lands under the right of eminent domain, as prescribed and regulated under the act of 1847, ch. 272, p. 301. That they attempted to acquire title in the manner required by law, but have failed, and that the title of the Schenectady and Troy Rail Road Company, and of the petitioners, is *defective;* and the first question that presents itself for the consideration of the court is whether their title is defective or not.

By the 13th section of the general rail road act,(*a*) it is provided, that in case any company is *unable to agree for the purchase of any real estate* for the purposes of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings pointed out in the act. The 14th section prescribes what the petition shall contain, and among

(*a*) *Laws of* 1850, *ch.* 140; 1 *R. S. 4th ed. p.* 1220.

other things "*that the company has not been able to acquire title thereto, and the reason of such inability;*" and it must state the liens or incumbrances upon said real estate, and the names of those who have *estates or interests* in said real estate; and a copy of the petition with a notice is directed to be served on all persons whose *interests* are to be affected by the proceedings. The 15th section declares that on presenting such petition, with proof of service of copy and notice, all persons *whose estates or interests are to be affected* may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it. And the court, after hearing the proofs and allegations of the parties, if no sufficient cause is shown against granting the prayer of the petition, shall make an order for the appointment of commissioners. The 21st section, under which the petitioners claim that they are entitled to the relief sought for, enacts, "that if at any time after an attempt to acquire title by appraisal of damages or otherwise, it shall be found that the title thereby attempted to be acquired is *defective*, the company may proceed anew to acquire or perfect such title, in the same manner as if no appraisal had been made; and at any stage of such new proceedings, the court may authorize the corporation, if in possession, to continue in possession, and if not in possession to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the company on account thereof, on such company paying into court a sufficient sum, or giving security as the court may direct, to pay the compensation therefor when finally ascertained; and in every such case the party interested in such real estate may conduct the proceedings to a conclusion, if the company delays or omits to prosecute the same."

It is argued by the counsel in opposition, that the petitioners do not show that their title is defective within the meaning and legal construction of this section; that a mere lien or mortgage does not affect the title; and that the petitioners or the Schenectady and Troy Rail Road Company obtained the legal title through the conveyances from their grantors claiming to derive

title under the sheriff's deed; that although that deed was adjudged to be void for uncertainty, by the decision of the court of appeals, yet that all other proceedings connected with it having been regular, and the purchasers or grantees having entered into possession under it in good faith, claiming title, and they and their grantees and successors having been in such possession with such claim of title since 1831, a sufficient adverse possession is created, and at all events such a one as will authorize a presumption of title and in the petitioners, so far as the heirs of Elias Kane are concerned. Without proceeding to examine the question whether such adverse possession is established or not, I am of opinion that the petitioners come within the provisions of the 21st section, and that the lien of the mortgage upon the premises described in schedule A, is one of the *defects* contemplated in that section. Why was it required in the 14th section, that all persons who have estates or *interests* in the real estate to which title is sought to be obtained shall be made parties and be named in the petition, and shall have notice of the proceedings? and in the 15th section, that proof should be made, on presenting the petition, of service of notice on all persons, whose estates or *interests* are to be affected by the proceedings, and that such persons may show cause against the proceedings, as the counsel for Mr. Peck are now willing to do under that section? And why does the 16th section require that the commissioners shall determine and report what compensation shall be made to the party or parties *owning* or *interested* in the said real estate; and why does section 18 declare that on a compliance by the company with all the provisions of the act, all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in said real estate during the corporate existence of the company? The answer to these questions, it appears to me, is plain. The object of the act undoubtedly was to enable the rail road company to acquire perfect title to the real estate, upon which their road should be located, unincumbered by any lien of mortgage, judgment or otherwise. The 19th section provides, that if there are adverse and conflicting claimants to the money, or any part

of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the company, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made; that is, in cases of mortgages or judgments, it may order the moneys to be paid to the owners of them in preference to the owner, or holder of the legal title, or so much as shall be sufficient to satisfy those liens. It is not pretended but that if the holders of this mortgage had been made parties to an original proceeding if one had been instituted under the act, and the title had not been procured by agreement, the claim or lien of the mortgage would have been extinguished. But it is said that the bringing in incumbrancers is merely incidental to the proceedings against the owner of the title. The object, as just remarked, was to enable the company to procure perfect title, and to extinguish all liens upon the property. The 20th section says the court shall have power at any time to amend any defect or informality in any of the special proceedings under the act as may be necessary, or to cause new parties to be added, and to direct such further notices to be given *to any party in interest* as it deems proper. It is said the holder of the mortgage has not such an interest in the land as is intended in the several sections of the act; and that, unenforced, it cannot render the title defective. It is true that a mortgage may be assigned without delivery, and that payment discharges it, and that an outstanding mortgage is not a breach of the covenant of seisin where there has been no foreclosure or entry. (16 *John. R.* 256. 7 *id.* 376.) Nor is it a transfer of title. But a mortgagee has such an interest in the land covered by the mortgage, that he may stay waste; and that interest remains notwithstanding a transfer of the title by the mortgagor, and the intention of the act was to protect his lien as well as to provide for a good title to the company, by requiring him to be made a party to the proceedings, in order that he might receive the money arising from the appraisal, in preference to the mortgagor. If the land should be sold under

the decree upon this mortgage, and bid off, there is no question but that the company could proceed under the 21st section against the purchaser. And are they obliged to wait, until the additional expense of a sale is incurred? I think not; but that they may proceed immediately, and on complying with all the provisions of the act, have their lien extinguished as to the pieces of land in their possession.

It is objected that the petition is defective in not showing an inability to agree for the extinguishment of the mortgage lien; that no attempt to *agree for a discharge* of the lien is stated. The 16th section does not require the *petition to state* that the company has been unable to agree for the purchase, but that the company has not been able to acquire title to the land, and the reason for such inability. The petition states that the company have not been able to obtain a perfect title for the causes stated in it. This is, I think, a sufficient compliance with the terms of the section. It is further objected that no proceedings can be had to perfect the title under the 21st section, unless there has been a previous appraisal. The words of the section are that the party may proceed under it, "if at any time after an attempt to acquire title by appraisal of damages or *otherwise*, the title attempted to be acquired is defective." This language is sufficiently broad to include both cases, as well where the title is attempted to be procured by agreement and purchase, as by appraisal.

It is still further objected, that the Schenectady and Troy Rail Road Company, by the exercise of ordinary diligence could before constructing their road have acquired actual knowledge of the mortgage by a search of the record. The mortgage was given and recorded in May, 1817. The titles were procured in 1841, more than *twenty years* after the date and recording of the mortgage. Searches usually do not extend beyond a period of twenty years; and if they do, it is generally presumed that incumbrances of an earlier period are paid. It was supposed this mortgage was paid, or otherwise extinguished; and the supreme court dismissed the bill of foreclosure. I think the petitioners are not too late in applying for relief, after the decision

of the court of appeals declaring the validity and lien of the mortgage upon the premises. On the whole I am of opinion that the prayer of the petition should be granted, but that the commissioners should be appointed under the act of April, 1854, which provides for the appointment of three commissioners by the court, who reside in the county where the lands are situated, or some adjoining county.

This conclusion is arrived at without reference to section 60, (1 *R. S.* 1242, *4th ed.; Laws of* 1847, *ch.* 272, § 3,) which was not referred to by either party on the argument. That section provides for a case where a rail road company shall not have acquired a valid and sufficient title to any land upon which they have constructed their track, or where the title has been or shall be hereafter rendered invalid by reason of any *mortgage, judgment or other lien;* and the section declares how the company may acquire title in such a case.

It was insisted that if the court had jurisdiction to appoint commissioners, they would be bound to include in their appraisement the value of the improvements or "industrial accessions," inasmuch as the point was expressly passed upon and adjudicated by the court of appeals; and it was suggested that the court, to prevent subsequent litigation, should direct the commissioners to embrace the value of the improvements in their appraisement. I think the court, at this stage of the proceedings, have nothing to do with that question.

Section 16 prescribes the duties of the commissioners, and directs them to give notice to the parties when they will meet, and it directs them to hear the proofs and allegations of the parties, to reduce the testimony to writing, and make such compensation as shall be just. They are to make report of their proceedings, which report must be confirmed on notice, by the court, who may direct as to whom the moneys shall be paid. The appraisal must be made as the *statute directs*, and the court have no power to vary that direction.

The motion must be granted, and John Willard, George G. Scott and Joseph W. Horton are appointed commissioners. The order must direct that all proceedings on the part of Charles

Pepper *v.* Haight.

A. Peck, under his decree, to foreclose his mortgage, be stayed as to the several parcels of land mentioned in the petition, until the further order of the court.

[Franklin General Term, September 4, 1854. *Hand, Cady, C. L. Allen* and *James*, Justices.]

## Pepper, administrator &c. *vs.* Haight and others.

20 429
2h 594
26h 604
43k 215

A deed of conveyance, and a bond and mortgage executed by the grantee, to secure the payment of the purchase money, and bearing even date with the deed, form parts of one transaction, and are to be construed together, as one instrument.

It is competent for a defendant to waive a technical legal defense grounded on an illegality in which he himself knowingly participated, and to affirm the contract so far as the parties to it were concerned.

Objections may be urged, on an argument at a general term, which were not raised on the trial, if they are such as could not have been obviated at the trial.

A defense that a mortgage is void, for being given upon an illegal consideration, will be waived by the omission to set it up specifically in the answer, and by admitting the validity of the mortgage in the answer and on the trial.

The sale of a pretended title to land is an illegal consideration. It is both criminal and immoral; and a mortgage given for the purchase money is void.

There is a distinction between contracts which are immoral and criminal and those that are merely void. Where the contract is simply void and not criminal, assistance may be given to a party to recover back his money, while the contract remains executory. Where money has been paid on an illegal contract which has been executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid.

A distinction also exists where the action is in affirmance of the contract, and the object is to enforce its performance, and where the action proceeds in disaffirmance of it.

Where both parties are equally guilty, as where they make a contract which is illegal, because contrary to the provisions of a statute, or the general principles of public policy, the rule *potior est conditio defendentis* applies.

The principle is that no court will lend its aid to a man upon an immoral or illegal contract—not for the sake of the defendant, equally in fault with the plaintiff, and in whose mouth it does not lie to say the contract is immoral or illegal—but because the court will not lend its aid to such a plaintiff.

Where a mortgage contains a clause showing that a part of its consideration is the sale of certain premises in the possession of a third person and held ad-

versely by him, under a claim of title, the contract is directly in conflict with the statute prohibiting the sale of pretended titles, (2 *R. S.* 691, § 6.) And both parties are guilty of a misdemeanor, and the contract is entirely void.

Where the condition of a mortgage, given for the purchase money, stated that the title to a portion of the morgaged premises was in dispute, the land being claimed by a third person, and that the mortgagee had agreed to give a good title to such disputed part, and stipulated that if he failed to do so, before or at the time the first payment became due on the mortgage, the mortgagor should have the right to keep back from the mortgage moneys whatever sums he should have to pay to obtain a good title and possession of the disputed part of the premises; *Held* that the covenant to give a good title was not a condition precedent to the payment of the mortgage.

When mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other; but when the covenants go to only a part of the consideration, then a remedy lies on the covenant, to recover damages for a breach of it, but it is not a condition precedent.

THIS was an action brought by the plaintiff as administrator of —— Phillips, deceased, to foreclose a mortgage. The defendants Haight and wife alone defended. They set up that the mortgage was subject to a condition, which was recited in it, and in the answer. The condition, among other things, stated that Haight had, on the day of the date of the mortgage, purchased of Phillips the premises described in it, being 101½ acres of land. That from three to five acres of the land were in the possession of one Philip Ellsworth, and was claimed as the property of said Philip or the heirs of John C. Smith. That Phillips, when he bargained and sold, promised that he would give a good title to the disputed part of the premises to Haight, and would give quiet and peaceable possession of the disputed premises free and clear of any expense. And it was agreed that if Phillips failed to give Haight a good and sufficient warranty title of the disputed part of the premises, and quiet and peaceable possession, before or at the time the first payment became due on the mortgage, Haight should have the right to keep back from the moneys due or to become due on the mortgage whatever sum or sums of money he should have to pay to obtain a good and *sufficient warranty title and possession* of the disputed part of the premises, with all costs and expenses. That Phillips or his heirs had not performed

the conditions mentioned in the mortgage, and had not *made, executed and delivered* to Haight a good and *sufficient warranty title deed, nor any deed,* which conveyed to Haight a good and sufficient title in fee simple to said disputed lands, and had never put Haight into quiet and peaceable possession of them. That Haight had performed all the conditions on his part, and on the first of April, 1837, paid on the mortgage the sum of $280, and in April, 1839, the further sum of $140. That the dwelling houses, barns, out buildings, garden, well, &c., were all situated on the disputed land claimed by Ellsworth, and that in 1848 Ellsworth commenced an action in the supreme court against Haight to recover possesion of the last described lands and premises; and that in January Haight was compelled to deliver up possession or pay Ellsworth $500, and $20 costs of suit; for one acre of said disputed land on which said buildings were situated. That except this one acre the whole of said disputed land had always remained in the possession of Ellsworth, who had refused to sell or deliver possession of the same. That Haight had expended a large sum of money in endeavoring to get title, amounting to $100.

The reply denied the facts set up in the answer, and averred that Ellsworth always remained in possession of the disputed part of the premises ever since the giving of the mortgage. That if Ellsworth ever commenced any suit against Haight it was not commenced in good faith but in collusion with Haight. The action was referred to John M. Carroll, Esq. to take the testimony and report to the court. The referee reported the testimony accompanied by a map showing the location of the premises. The greater part of them, including the house and barn and well, were situated southwest of a road marked on the map "*a a*," and passing by the house. Phillips built this house and barn, while he occupied, and was in possession of all that part of the farm, until he sold to Haight, who succeeded him in possession. Phillips was in possession twenty years ago. The land on the north side of the road called the three or five acres had been a common for 20 or 25 years until Ellsworth bought the adjoining lot north of that piece, in 1834. In about two

years after, Ellsworth enclosed the piece north of the road with his farm. It was marked on the map *b*, and called the three cornered piece. The defendants produced a deed from Hiram Dye to Ellsworth, dated 12 April, 1834, covering the 51½ acres, which the defendants claimed was the disputed land, including the house, garden, barn and well south of road *a a*. Ellsworth after that deed, commenced an action in the supreme court, as he testified, against Haight, in good faith, to recover possession of the buildings and land south of the road *a a*, (about one acre,) and afterwards sold the land to Haight for $500, being about its value, as he said. The evidence of the commencement of the suit, by parol, was objected to by the plaintiffs, as not the best evidence, and it was received subject to the objection. It appeared that the witness Ellsworth was the father-in-law of Haight. That he, (Ellsworth,) knew that Phillips lived on the land described in the mortgage, 25 or 30 years ago; that he recollected when Phillips built the house and barn now occupied by Haight, and dug the well south of the road *a a;* and built a fence in front along the road *a a*. That Haight went into possession of the same premises up to the road *a a*, and he and Byford had occupied them ever since. After Phillips came to the premises, Ellsworth occupied up to the road *a. a.* on the south, and Phillips up to the road on the north. It was proved that this road *a a* had been the dividing line between the premises in the possession of Phillips and those occupying on the other side, for 30 or 40 years, and had never been altered. Other testimony was taken, such of which as is material is alluded to in the opinion of the court. The plaintiffs, after the death of their testator, demanded on the premises, the amount due on the bond and mortgage, offering to deduct out of what was due the value of the piece of land in possession of Ellsworth from the time of the date of the mortgage; which offer was refused. The judge at the trial, directed the referee to report the value of this piece of land, and ordered that sum to be deducted from the mortgage at its date, and judgment in favor of the plaintiffs for the balance, with interest, after allowing all payments. The referee reported the value at $65, which

he deducted accordingly, from the amount of the mortgage ($1780,) at its date, on the first of Nov. 1836, and reported the balance due, after allowing payments to the amount of about $340, to be $966.54 for which judgment was entered in favor of the plaintiffs and a sale of the premises ordered. From this judgment the defendants Haight and wife appealed.

*Dodge & Campbell*, for the plaintiffs.

*Wm. Wait*, for the defendants, Haight and wife.

*By the Court*, C. L. Allen, J. The learned justice who tried the action, passed upon all the questions of fact, and as I understand from reading the case, found that the piece of land designated in the mortgage as the disputed part of the premises, consisting of from three to five acres of land, was that part in possession of Philip Ellsworth at the time of the execution of the mortgage, and lying north of the road *a a*. I do not see how he could well come to any other conclusion. The words in the condition itself, recited in the mortgage, are that "*from 3 to 5 acres of said land is in the possession of one Philip Ellsworth*, and is claimed as the property of said Philip Ellsworth or the heirs of John C. Smith." Ellsworth himself swears, and it was also proved by other testimony, that Phillips built the house and barn south of the road *a a*, and was in possession of them until and when he conveyed to Haight, in 1836, who took immediate possession thereafter and had always been in possession; and that Ellsworth never was in possession of any part south of the road *a a*, but only of the three cornered piece marked *b*, north of that road, which had been the dividing line between the Phillips farm and the part north of it for more than 30 years. There can be little doubt, therefore, but that the disputed land referred to in the mortgage was north of the road *a a*, and did not include the house and other buildings occupied by, and in possession of Phillips at the time of its date. The mortgage covers two certain pieces or parcels of land, particularly described in it; one containing 49 acres and being part of lot No. 244, in the eastern allotment

of Kingsborough, in Mayfield, and the other being part of lot No. 242, in the same allotment, containing 52½ acres. It was to secure the payment of the sum of $780, payable in installments, payment of which was to be made on the premises; and payments had been made, at different times, of $280. It is conceded that it was given to secure a part of the purchase money of the premises. But no deed from Phillips was exhibited in evidence, and the defendants chose to rely upon the agreement, contained in the mortgage. It nowhere appears distinctly, what the deed covered. From the recital in the mortgage it would appear somewhat doubtful whether it included the 5½ acres disputed land or not, for it is there stated that Phillips had promised "when he bargained and sold the premises, that he *would give a good title* of the said disputed part, and would give quiet and peaceable possession of the said premises, free and clear of all expense;" and if Phillips, his heirs and assigns should neglect and fail to *give Haight* a good and sufficient *warranty title* of the disputed premises, and quiet and peaceable possession, Haight was to be at liberty to hold back so much of the mortgage money as he should be compelled to pay to obtain and acquire such good title. The probability, however, is that the disputed part was conveyed, as it was included in the mortgage. But it was probably by a quitclaim, as no warranty deed is shown to have been given, and the breach alleged in the answer is, that Phillips, his heirs and assigns have *not made*, executed and delivered to Haight, his heirs and assigns, a good and sufficient warranty title deed, nor any deed which conveys to Haight a good and sufficient title in fee simple to said disputed land mentioned. The mortgage is all we have to rely upon for evidence, as before remarked; and that does not show that there was a warranty of title at the time of its execution; on the contrary, if it proves any thing it shows that Phillips covenanted and agreed to procure and give such *deed thereafter*. The statute, (1 *R. S.* 738, § 140,) expressly declares, that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. (11 *Paige*, 566.)

It is contended on the part of the defendants that the bond and mortgage in this case are void, and that no action can be sustained upon them. It is probable, as before remarked, indeed it is conceded, that the bond and mortgage were executed to secure a part of the purchase money of the premises described in the mortgage and which had been conveyed by deed of Phillips, bearing even date with the mortgage. All these instruments therefore form parts of one transaction, and are to be construed together as one instrument. (*Cornell* v. *Todd*, 2 *Denio*, 130. 1 *Comst.* 186. 10 *Wend.* 218, *and various other cases.*)

The objection taken to this defense is, 1. That the defendants have not set up or pretended to any such defense in their answer, but on the contrary that the mortgage is, by the answer, admitted to be good and binding, and that the defendants claim to have made payments upon it, and ask other relief under it, and nowhere claim it to be void. 2. That they raised no such point on the trial before the justice, and are therefore not at liberty to present it here; and 3. That the mortgage is perfectly valid as between *Phillips* and Haight, and all others, except the *person in possession* of the land holding under the adverse title.

It is true, that the defendants in their answer do not pretend or claim that the mortgage is void, but rather confirm its validity, and claim relief under it. This however may be said to be such relief as the court may consider them entitled to, provided it be held that the mortgage is good. The question is, were the defendants bound to set up or aver in their answer that the contract was void, in order to enable them to avail themselves of such a defense? As between themselves, parties may waive the defense which the law authorizes them to make; and before the code they could be permitted to take the objection or make the defense without special plea, under the general issue. Such was the case, for instance, as to the defense of usury. But since the adoption of the code, there is no longer, strictly speaking, any such plea as the general issue; and there can be no answer, therefore, in that form. One object of the code, it has been remarked, was to compel parties to disclose

to each other the facts upon which they respectively relied to uphold the claim on one side and to maintain the defense on the other. (*Report of Com'rs*, 141.) And in *Fay* v. *Wilson*, (10 *Barb.* 321,) it was held that the defense of usury, if the defendant intended to rely upon it, must be distinctly set out in the answer. (6 *How.* 302.) And on a sealed instrument the statute makes it necessary that the want of legality of consideration should be set out in the answer, if the defendant intends to rely upon it as a defense. (2 *R. S.* 3*d ed.* 504, §§ 96, 97.) The answer here not only does not claim that the mortgage is void, but admits its validity and insists that the defendants have performed all the conditions required in it, on their part, and have paid several sums of money upon it. That they have been compelled to pay $500 to procure title to part of the disputed lands, and other expenses, which they claim to have deducted from its amount. Now if it be conceded that it was not necessary specifically to set up this defense in the answer, (which I am not prepared to concede,) still it was competent for the defendants to waive a technical legal defense grounded on an illegality in which they themselves knowingly participated, and to affirm the contract so far as the parties to it were concerned. It is true the law will always leave them where it finds them, and not assist either, where the rights of third persons do not require an interference. But they may carry out their own agreements, subject to all liability which they incur, criminally or otherwise, if they do not call upon the courts to aid them. And I do not perceive why, as against each other, they may not waive any defense grounded upon their own turpitude in part, as it has repeatedly been held they may waive the defense of usury.

Again; the defendants not only omitted to set up this defense in their answer but they did not claim or interpose it upon the trial of the cause. This is another evidence of *waiver*. The exception, it is true, to the decision of the court, embraces this objection; but it does not appear to have been presented on the trial, or passed upon by the judge. That, perhaps, was not necessary, to prevent its being present-

ed here, if the answer was sufficient. Objections may be urged on the argument at general term which were not raised on the trial, if they are such as could not have been obviated at the trial. (5 *Wend.* 301. 20 *id.* 210. 16 *id.* 522.) If the mortgage was *void*, then the objection could not have been answered at the circuit, any more than it could have been here. But some additional evidence might have been given, going to show that the case was not strictly within the statute. I am inclined to the opinion that the defense was waived, by not specifically setting it up, and admitting the validity of the mortgage in the answer, and on the trial. Suppose, however, that the objection may be taken here, is it fatal to this objection?

There is no doubt but that the consideration of the bond and mortgage was the conveyance of the mortgaged premises. This was an entire consideration, and if it was in part illegal, is not the whole contract void? (*Chit. on Cont.* 425. *Burt* v. *Place*, 6 *Cowen*, 431. *Mackie* v. *Cairns*, 5 *id.* 548, 580. *Hyslop* v. *Clark*, 14 *John.* 458. 13 *Wend.* 53. 20 *id.* 390. *Nellis* v. *Clark*, 4 *Hill*, 424.) We have recently so held in the case of *Barton* v. *The Port Jackson and Union Falls Plank Road Co.*, (17 *Barb.* 397.) In *Woodworth* v. *Janes*, (2 *John. Cas.* 417,) this principle was applied to a sale of land, and it was held, in the court of errors, where A. executed to B. a quitclaim deed for land, claimed by the state of Pennsylvania, and received the notes of B. in payment, on a bill filed to obtain an injunction to stay the collection of the notes, that the sale was maintenance in selling a *pretended title*, and that both parties being *in pari delicto*, a *court of equity* would not relieve either, but leave them to pursue their remedies at law, and the bill was dismissed. In *Whittaker* v. *Cone*, same volume, p. 58, the supreme court decided that where notes were given for the purchase money on a contract for the sale and purchase of Susquehanna lands, within the jurisdiction of Pennsylvania under the Connecticut claim to those lands, the sale was illegal and the consideration void.

The 6th section of the statute (2 *R. S.* 691) declares it to be a misdemeanor for any person to buy or sell, or in any manner procure or *make or take* any promise or covenant to convey any

pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise, shall have been in possession of the same, or of the reversion or remainder, or have taken the rents and profits thereof for one whole year before such *grant, conveyance or promise.* The sale of a pretended title to land is therefore an illegal consideration; it is both criminal and immoral. There is a distinction undoubtedly between contracts which are immoral and criminal and those that are merely void. Where the contract is simply void and not criminal, assistance may be given to a party to recover back his money, where the contract remains executory. Where money has been paid on an illegal contract which has been executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid. A distinction exists where the action is in affirmance of the contract and the object is to enforce its performance, and where the action proceeds in disaffirmance of it. (4 *Barb*, 524, 527, *and cases there cited.*) Where both parties are equally guilty, as where they make a contract which is illegal, because against the provisions of a statute, or the general principles of public policy, the rule "*potior est conditio defendentis*" applies. (4 *Hill*, 624. 20 *Wend.* 26. 20 *John.* 386.)

The principle is that no court will lend its aid to a man upon an immoral or illegal contract, not for the sake of the defendant, equally in fault with the plaintiff, and in whose mouth it illy lies to say the contract is immoral or illegal, but because the court will not lend its aid to such a plaintiff. (20 *Wend.* 32.) Whatever the parties have fraudulently or illegally contracted to execute, the law refuses to compel the contractor to execute, or pay damages for not executing. It will leave the parties where it finds them. (*See Perkins* v. *Savage*, 15 *Wend.* 412; 7 *Paige*, 616, 653.)

Now test the facts in the case under consideration with those principles and decisions, and to what conclusion must we arrive? The mortgage given in evidence by the plaintiff contains a clause showing that part of its consideration was the sale of certain premises in "the possession of Philip Ellsworth and claimed as

the property of Ellsworth or the heirs of John C. Smith; held adversely, or stated to be the disputed part of the premises" thus sold and conveyed; coming directly in conflict with the provisions of the section of the statute before cited, and making both parties guilty of a misdemeanor, and the act or contract itself entirely void; and being in part only executed, it cannot be farther enforced by either party as against the other. It is said that being under another section of the statute, declaring (1 *R. S.* 739, § 147, [160,] 4*th ed.* 169) that every grant of land shall be absolutely void, if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor, the conveyance and contract was only void as to the person holding adversely, and not as between grantor and grantee. In *Livingston* v. *Proseus*, (2 *Hill*, 526, 528,) it is said to be well settled that as between grantor and grantee and persons standing in legal privity with them, the deed is operative and passes the title; and a great number of cases are there cited in support of the principle. The case of *Van Hoesen* v. *Benham*, (15 *Wend.* 164,) decides that a deed of land held adversely at the time is effectual between the parties to the conveyance; that the deed operates to estop the grantor; that it is a principle running through the books, that a feoffment upon maintenance or champerty is good as between feoffor and feoffee, and is only void against him who hath right.

It has been before remarked that there was no warranty of title and no eviction, and there has been a payment of a part of the purchase money. Under those circumstances the mortgagor cannot be relieved from proceedings on the mortgage. (*Abbott* v. *Allen*, 2 *John. Ch.* 519. *Bumpus* v. *Platner*, 1 *id.* 213.)

I do not however agree with the counsel for the defendants, that the covenant in the mortgage, to give a good title, was a condition precedent to the payment of the mortgage. It was clearly not so intended by the parties. The defendant Haight made payments on the mortgage. By the provision in it Haight was to be entitled to keep back sufficient to indemnify him for any moneys he should be compelled to pay to procure good title

to the disputed part. Where a covenant only goes to part of the consideration on both sides, and a breach of the covenant may be paid for in damages, it is an independent covenant, and an action may be maintained without averring performance. (*Grant* v. *Johnson*, 5 *Barb.* 161.) Where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other; but when the covenants go to only a part of the consideration, then a remedy lies on the covenant, to recover damages for a breach of it, but it is not a condition precedent.

If the defendants were entitled to have any thing deducted from the amount due on the mortgage, it would only be the value of that part of the premises in possession of Ellsworth. It has been before shown, that Phillips had been in possession of all the premises up to the road *a a*, before the deed to Ellsworth from Dye covering the house, barn and well south of that road. That deed was certainly void if the one from Phillips to the defendants was, and for the same reasons. The contract only recites that part which was in possession of Ellsworth as the disputed land, and cannot be construed to include any other part. The defendants have never been lawfully evicted from any part south of the road *a a*. It is true that Ellsworth, the father-in-law of Haight, testifies that he commenced an action in the supreme court against Haight to recover the one acre on which the buildings were; that there was no legal evidence of any action having been commenced; and Haight never gave any notice to Phillips that such action had been commenced, but proceeded on his own responsibility and risk to pay Ellsworth for his pretended title, without at all consulting Phillips. The evidence, so far from establishing any title in Ellsworth, under the deed from Dye, showed that deed to have been entirely void at the time of its execution, and that Ellsworth would not have been entitled to recover against Haight in the action which he brought against him. Haight therefore settled that action and paid the money in his own wrong. He had no right to judge of the sufficiency of Ellsworth's title. He should have defended the action, or given notice to Phillips or his heirs, to defend. He did neither

but quietly submitted to the terms imposed by Ellsworth, and the probability is that it was a contrivance between Haight and his father-in-law to have this claim set up by Ellsworth and allowed by Haight for the purpose of swallowing the amount due on the mortgage. I do not say that the judge so found the fact, but I think he would have been warranted in so doing, from all the evidence. Haight went into possession of the mortgaged premises at the time of the execution of the mortgage, and has remained in possession ever since, except as to the part north of the road *a a*, of which he has never been in possession. The value of that part, however, has been deducted from the amount of the mortgage.

On the whole, I am of the opinion that if the contract is to be deemed legal, the action was properly disposed of at the circuit, and that the judgment should be affirmed.

Judgment affirmed.

[Franklin General Term, September 4, 1854. *Hand, Cady, C. L. Allen* and *James*, Justices.]

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Eliphalet Hall, who sues in his own right as well as administrator &c. of Ephraim Hall deceased, *vs.* Austin Fisher and others, executors &c. of Henry Fisher deceased.

A complaint filed by a plaintiff in his own right as well as in the character of administrator of E. H., against the defendants as the executors of H. F., alleged that the plaintiff and his intestate E. H. were in the lifetime of the latter, tenants in common owning one undivided quarter with H. F. in his lifetime, who owned three quarters, of a lot of land, and iron ore bed, &c. And the plaintiff claimed that the defendants should account to him in person and as administrator of E. H., for their share of the rents and profits, avails and income of the ore bed &c., and for their share of the ore dug and raised by H. F., and for their share of the moneys had and received by H. F., including what he ought to have received for the use, rents and profits of the improvements, buildings, fixtures and erections of the plaintiff and E. H., and for the wear and damage of the same &c., and for the loss, damage and injury sustained by the

plaintiff and E. H. by reason of the acts done by H. F. while in the exclusive possession, &c. *Held*, on demurrer, that there was an improper joinder of claims in the complaint, in attempting to unite the rights of the plaintiff personally with those in his representative character; the claims being inconsistent and adverse.

The same complaint, in addition to a claim for an account, after setting out the title of the plaintiff and his intestate, to one quarter of the lot and ore bed, and showing large and valuable erections and fixtures made by them, averred that H. F., contriving and intending to injure and defraud the plaintiff and E. H., and *falsely pretending* that they were not the owners of one-fourth part of said lot and ore bed, but that he was sole owner thereof, procured an injunction, and caused the same to be served on the plaintiff and E. H., restraining them from digging or raising any iron ore on said lot &c., and by means of such service thereof occasioned all the *damages* which the plaintiff alleged were sustained. The plaintiff also claimed to recover damages for trespass on houses, erections and fixtures which the plaintiff and E. H. erected, at an expense of $5000, and for their share of the expense of those erections. The complaint also alleged that H. F. diverted to his own use a quantity of ore dug and raised by the plaintiff and E. H.; and that he received $20,000 profits, and might with proper management, have received $20,000 more. *Held* that the complaint was defective in joining causes of action arising upon *contract*, with claims of damages for *injuries to property* and for torts and causes of action arising from *negligence*, with a claim for an *account* of rents and profits of real estate.

*Held also*, that the falsely and fraudulently obtaining an injunction, and the damages occasioned by its service, were not a matter of account, and formed no ground for a bill in equity or an action under the statute. (1 *R. S.* 750, § 9.)

The bond given by the party obtaining an injunction affords an ample remedy for any damages sustained by the defendant, and to an action upon such bond he must resort for indemnity

An action for malicious prosecution will not lie until the final termination of the suit; and the complaint must allege a want of probable cause, by averring that the suit was finally determined in favor of the defendant therein.

THIS was an appeal from an order made at a special term, allowing a demurrer to the complaint. The plaintiff averred that on, and for a long time previous to the 12th of June, 1845, the plaintiff and his intestate were seised and possessed as tenants in common in fee simple, in their own right, of the one equal undivided fourth part of an iron ore bed on lot No. 42 of the iron ore tract in the county of Essex and state of New York, together with all the privileges appertaining thereto, and of all necessary timber and utensils on the lot, necessary to use,

in digging and carrying away the ore. That Henry Fisher, the defendant's intestate was, at and during the same time, the owner and possessor of the remaining three-fourths of the said lot and the ore rights and privileges, as tenant in common with the plaintiff and his intestate; that a very valuable mine or bed of iron ore was situated on said lot, which during the said time was worked by the said Halls and returned to them for their share thereof an annual value of $10,000 and upwards. That said Halls, previous to and on said 12th day of June, 1845, had expended $10,000 in opening and uncovering the bed and in working it, and had also expended $5000 and upwards in erecting and putting up shops, dwelling houses, barns, scales, coal houses and various other erections and fixtures for their necessary use in enjoying and availing themselves of the benefits, rights and privileges of the said lot. The complaint further averred that the said Henry Fisher, on the said 12th day of June, 1845, contriving and intending to injure and defraud the said Halls, and falsely pretending that they were not the owners of one-fourth part of said ore and said rights and privileges, but that said Fisher was the sole owner thereof, procured and caused to be served on the said Halls, an injunction out of the (then) court of chancery of the state of New York, enjoining and commanding the said Halls and their agents and servants to desist and refrain from digging or raising any iron ore on said lot 42, or from taking and carrying away, or selling, any ore raised or dug thereon since the 1st day of May, 1845, or from cutting any timber, or collecting any claims or debts, or discharging any, on account of ore dug since that day. That at the time of the service of said injunction the said Halls had on hand on and near said lot 42, one thousand tons of iron ore, of the value of $3000, which they had raised from said bed between the 1st of May, 1845, and the issuing and service of said injunction, which they were entitled to use and sell, but which, by reason of said injunction they were wholly prohibited from selling or using, and the same was taken possession of by said Fisher, and by him converted to his own use, or by his negligence wasted and destroyed, and said Halls never recovered possession of the same. That

there were divers debts due the said Halls, for ore raised, which they were prevented by said injunction from collecting, whereby many of them became bad and uncollectable, and entirely lost; especially a debt against one Chester Stephens of $300, for iron ore dug by him, who, while said injunction was pending, became insolvent and the said debt became lost. That said Halls were also deprived of the privilege of digging ore and of the benefit of their expenditure and labor in uncovering and opening the said ore bed, and deprived of the use and benefit of their buildings, erections and fixtures, and the said Henry Fisher took the sole and exclusive possession of the said ore bed with the appurtenances, and of all the rights and privileges of the said Halls, and of the buildings and erections, and of the ore on hand dug and raised since the said 1st day of May, 1845, and wholly excluded the said Halls therefrom, and so held them exclusively till the 13th of May, 1847, at which time the said Henry Fisher died, having first made and published his last will and testament, and appointed the defendants his executors, which will was, after his death, proved, and letters testamentary granted to the defendants as executors, by the surrogate of the county of Essex, on the 3d of June, 1847. The complaint further averred, that while said Henry Fisher held and retained the sole use and occupation as aforesaid he received to his own use the whole of the profits and income of the said bed &c., amounting to the sum of $20,000, one-fourth of which belonged to the said Halls, for which the defendants ought to account; and that said Henry injured and damaged the improvements and buildings &c. erected by said Halls, by carelessness, negligence and improper usage, to the value of $1000, and while he used and held the same might have realized, by proper management thereof, a further sum of $20.000, to one-fourth of which said Halls would have been entitled; all of which was lost by reason of the improper management of the said Henry and his agents, and whereby the said Halls, on regaining possession of said ore beds, were put to the expense of $500 in replacing the same on its former footing, and lost other $500 by the hindrance and delay occasioned by the necessary repairs; for all which the defend-

ants ought to account. The complaint further averred, that since the death of the said Henry Fisher the said Ephraim Hall died intestate, and letters of administration on his estate were granted by the county judge of Essex county to the plaintiff. That after the death of Fisher and before the death of the said Ephraim Hall, the said injunction was dissolved, and possession of the said lot and beds and all their rights and privileges restored to the said Halls. The plaintiff claimed that by occasion of the premises the said Henry Fisher became liable to account to the Halls for their share of the use, rents and profits of the ore beds, and for their share of the moneys received by him, and for the other profits which he might have received by proper management, and for the use of the buildings, erections and fixtures, and their wear and damage as aforesaid, and for the injuries occasioned thereto, and for the ore dug and raised by said Halls between said 1st day of May, 1845, and the service of the injunction, and for all losses, damages and injuries by the said Halls sustained; and that the defendants were liable as execu tors &c. to account to the plaintiff in his own right and as administrator of the said Ephraim, jointly, for such sums as might be proved due from said estate of said Henry upon such accounting, on occasion of the premises. And they prayed that an account might be decreed on these principles.

The defendant Calvin Fisher demurred to the complaint, for the following causes: 1. That there was a defect of parties plaintiff to the action. 2. That several causes of action had been improperly united in the same complaint. 3. That the plaintiff had improperly in his complaint alleged causes of action existing in his own right, with claims made by him in the capacity of administrator, &c. 4. That the plaintiff had also improperly united in his complaint alleged causes of action arising upon contract express or implied, with claims of damages for injuries with or without force, to property. 5. That the plaintiff had improperly united alleged causes of action in his complaint arising from negligence, with claims for an account for rents and profits of real property. 6. That the causes of action united in the complaint did not all belong to one class and

were not separately stated. 7. That the complaint did not state facts sufficient to constitute a cause of action.

The court, at special term, ordered judgment for the defendants, on the demurrer, and the plaintiff appealed to the general term.

*Kellogg & Hale* and *G. A. Simmons*, for the plaintiff.

*B. & A. Pond*, for the defendants.

*By the Court*, C. L. ALLEN, J. I am inclined to think there is an improper joinder of claims, by attempting to unite the rights of the plaintiff personally with those in his representative character as administrator of Ephraim Hall. The two Halls, as charged in the complaint, were tenants in common owning one quarter, with the defendants' testator, who owned three-fourths, of the lot and the ore bed. The claim is that the defendants account to the plaintiff in person and as such administrator, for their share of the rents and profits, avails and income of the ore bed, rights and privileges while their testator held the exclusive possession thereof, and for their share of the ore dug and raised by said Henry from the land during that time, and for their share af the moneys had and received, including what said Henry ought to have received for the use, rents and profits of the improvements, buildings, fixtures and erections of the said Halls, and for the wear and damage of the same, and for the injury and obstructions to the use of said ore bed, and for the ore so dug and raised by the Halls between the 1st of May, 1845, and the issuing and service of the injunction, and for the debts which the Halls lost, and for all and singular the *loss*, *damage* and *injury* which the said Halls sustained by occasion of the premises, of *every nature soever*. The amount due to each tenant in common from his co-tenant, is a several debt to himself alone, (4 *Paige*, 363,) and not to the tenants or a portion of them *jointly*. The rights and claims attempted to be united are inconsistent and adverse. (*Alston* v. *Jones*, 3 *Barb. Ch. R.* 397.) But the plaintiff alleges that this is an

action for an accounting, and that all parties interested should be made parties to the suit, so that there need to be but one accounting. If this be so, then the causes of action or claims should be separately stated. How else can the defendant, if he has a defense of a different character against each co-tenant, avail himself of such defenses? He might in this case have one defense against the plaintiff as to his personal claim, and another defense as to the intestate whose rights he claims to represent as administrator. The statement of the causes should have been separate and distinct. (*Code*, § 167, *sub.* 7. 4 *How.* 226. 5 *id.* 171, 177. 8 *id.* 177. *Brady & Ellsworth* v. *Lockwood, MS.*)

But however this may be, I am of opinion that several causes of action have been improperly united in the complaint. The plaintiff claims that the action is for an accounting, against a co-tenant in common, for receiving more than his proportion of the common property. But it is more. The complaint, after setting out the title of the plaintiff and his intestate to one quarter of lot 42 and the ore bed thereon, and showing large and valuable erections and fixtures made by the Halls for their benefit and to enable them to enjoy and work the property, avers that on or about the 12th day of June, 1848, the said Henry Fisher, contriving and intending to injure and defraud the said Halls, and *falsely pretending* that the said Halls were not the owners of a quarter part of said ore and lot, but that he was sole owner thereof, procured an injunction in the manner stated in the complaint, and by means of its service occasioned all the *damages* which *the plaintiff alleges were sustained.* This is not matter of account, and no bill in equity or an action under 1 R. S. 750, § 9, could be sustained upon it. The falsely and fraudulently obtaining this process, and the consequences arising out of its service, seem to form the principal part of the complaint. They are the gravamen of the action. The action of account should be founded upon a relation in the nature of a trust. (3 *Hill*, 60.) The bond required to be given, and which was given at the time of obtaining the injunction, afforded, as it was designed to do, an ample remedy for these damages, and to

an action upon that the plaintiff should have resorted. If this were to be called partly an action for a malicious prosecution—and it would seem to be so, from the nature of the complaint—then it would not lie until the final termination of the suit. The complaint does not allege that the suit has terminated, but only that the injunction was dissolved. It should allege want of probable cause, by averring that the suit was finally determined in favor of the defendant therein. A claim founded in tort is also united in the complaint, for diverting to his own use by the said Henry Fisher 1000 tons of ore dug and raised by the Halls before the service of the injunction.

Another claim is for trespass on houses, erections and fixtures which the Halls erected at an expense of $5000, before the service of the injunction, and the claim for their share of this expense is also added. It is not averred on what land, or where, these erections were made; but the defendant's intestate is charged with wrongfully taking possession of, and using and injuring them by his carelessness and negligence, as well as the ore bed.

The plaintiff also claims that said Henry Fisher received $20,000 profits, and might with proper management have received $20,000 more. Now a tenant in common is not liable for negligence or misuse of the common property, nor for what he might have made by diligence, unless appointed bailiff, &c. (*Henderson* v. *Eason*, 9 *Eng. Law and Eq. Rep.* 337.)

It is said by the plaintiff's counsel that there is but one cause of action, and that all the claims are but parts of one and the same establishment, and incidents of the tenancy in common and of the mining business. But all these are promiscuously stated and jumbled together, and they do not all belong to one of the classes mentioned in the several subdivisions of section 167. It may be questionable, since the decision in *Tripp* v. *Riley*, (15 *Barb.* 333,) whether Henry Fisher could be chargeable and liable to account in this action, unless it was averred and shown that he had received more than his share (three-fourths) of the ore bed. But it is not necessary to pass upon that point, here.

Without further examination I can only say that I fully con-

cur-with the learned justice who delivered the opinion at special term, and in the views there expressed. The order must be affirmed, with $10 costs.

[Washington General Term, January 1, 1855. *Hand, Cady, C. L. Allen* and *James*, Justices.]

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## McMillan, adm'x, &c. *vs.* The Saratoga and Washington Rail Road Company.

Where, in an action against a rail road company, the complaint, after stating that the defendants were an organized company and the owners of the road, and were running it, averred that on, &c. while they were so running the road, the plaintiff's intestate was in the employ of the defendants, as an engineer upon their locomotive, while it was in their use and service; *Held* that this was a sufficient allegation to show that the relation of master and servant existed between the parties.

But no special contract between the principal and agent is to be inferred from such an allegation.

A servant, to be entitled to recover of his principal for an injury happening to him in the course of his service, through defects in the machinery &c. used in the discharge of his duties, must prove actual notice to his principal of the defects. And in order to be able to prove notice, he must allege it in his complaint.

Thus where a complaint alleged that W. S. M., the plaintiff's intestate, was in the defendants' employ as engineer upon a locomotive used and running upon their rail road; that it was the duty of the defendants to provide a good, safe and secure locomotive &c., and a good, safe and secure track, and to keep the same in good repair, and to build, maintain and keep in good repair all necessary bridges, fences and cattle-guards, but that they, not regarding their duty, wrongfully and negligently provided, used and suffered to be used, an unsafe, defective and insecure locomotive, and failed and refused to provide a good, safe and secure track and road, or to keep the road in good repair, and neglected to build, maintain and keep in good repair all necessary bridges, fences and cattle-guards; that through a defect in the fence which it was the duty of the defendants to maintain and keep in good repair, a horse got upon the track from an adjoining lot, without any fault of W. S. M., and in consequence of the defendants' neglect to provide proper cattle-guards, ran over the road until he came to a bridge, where the locomotive struck the horse; and the locomotive was thrown off the track and W. S. M. was killed; *it was*

McMillan *v.* Saratoga and Washington Rail Road Co.

*held*, on demurrer, that the complaint was defective, in not averring *actual notice* to the defendants, of the defects occasioning the injury, or some of them.

It is the duty of an engineer, employed in running a locomotive upon a rail road, and it is confided to him by his employers, to guard against all accidents liable to happen by the escape of horses or other animals, upon the track, through a defect of fences, or otherwise. Hence he is bound to make known to the rail road company any defects of that nature which may exist. So in respect to any defects in the locomotive. And for not making them known he is responsible to the public as well as the company.

He may require special indemnity against all risks, or he may give notice to the company and throw the risk upon them.

THIS was an appeal from an order made at a special term, sustaining a demurrer to the complaint. That pleading averred that the defendants were, at the time of the injury complained of, a corporation duly organized, &c. That they were, at the said time, the owners and operators of a rail road, running from Saratoga Springs to Whitehall, and that they ran upon said road a certain locomotive. That on the 2d day of December, 1853, W. C. McMillan, the plaintiff's intestate, was in the defendants' employ as engineer, upon said locomotive, "and it then and there became and was the duty of the defendants to provide a good, safe and secure locomotive, with good, safe and secure machinery, and to provide a good, safe and secure track," and to keep the same in good repair, and to build, maintain and keep in good repair all necessary bridges, and also all fences on both sides of their road, and sufficient cattle-guards at all road and farm crossings. The complaint then averred that the defendants, not regarding their said duty, "*wrongfully* conducted themselves so carelessly, negligently and unskillfully in that behalf, that by and through such wrongful carelessness, negligence and unskillfulness and default of the defendants they *provided, used and suffered to be used*, an unsafe, defective and insecure locomotive on the said road, and wholly failed and refused to provide a good, safe and secure track and road, and neglected to keep their said road in good repair, and neglected to build, maintain and keep in good repair all necessary bridges, and also the fences, on both sides of the road

and neglected to maintain cattle-guards at all road and farm crossings.

The complaint then further averred that on the 2d of December, 1853, while the said locomotive was being run by the plaintiff's intestate *in the capacity of engineer for the defendants, and in their employ*, a horse that was in one of the lots contiguous to and adjoining said rail road, through and in consequence of a defect in the fence, between said lot and the rail road, *which it was the duty of the defendants to maintain and keep in good repair*, escaped into and upon the track of the road, and while on the road, without any fault of the said W. S. McMillan as such engineer or otherwise, was run down by said locomotive upon which the said W. S. McMillan then was; and that in consequence of the neglect of the said defendants *to provide proper cattle-guards* upon and over said road at the place aforesaid, the said horse was enabled to run over said road, until he reached a bridge over which the road passed, where said locomotive struck said horse. That in consequence of said defendants neglecting to maintain and keep said bridge in good repair, the same was unable to withstand the shock occasioned by the collision, and the horse and locomotive were thrown off the track on said bridge and the locomotive entirely destroyed that the cow-catcher of the locomotive was out of repair, and were the track and road also, owing to the negligence of said defendants, and that the locomotive was precipitated into the canal, and in falling struck the plaintiff's intestate and killed him. The complaint then averred that the plaintiff was the wife of the engineer and had been duly constituted administratrix, since his death, and brought her action under the statute, to recover her damages.

The defendants demurred to the complaint, and stated several grounds of demurrer, which are noticed, so far as is necessary, in the opinion of the court.

*A. Pond* and *C. S. Lester*, for the plaintiff.

*W. L. F. Warren*, for the defendants.

*By the Court*, C. L. ALLEN, J. The first ground upon which the demurrer in this case is predicated is, that the complaint does not set forth facts sufficient to constitute a cause of action. The complaint, after stating that the defendants were an organized company and the owners of the road, and were running it, avers that on the 2d day of December, 1853, while they were so running the road, the plaintiff's intestate was in the employ of the defendants as an *engineer* upon their locomotive, *while it was in their use and service on that day.* This is a sufficient allegation to show that the relation of master and servant existed between the parties. At all events it shows that McMillan was lawfully on the road on that occasion, at the request of the defendants, and as their servant actually engaged in conducting the locomotive at the time of the happening of the injury complained of. The duty is created by law, and the general allegation, I think, is sufficient. It may be said, it is true, that this is the rule as between the company and third persons, but that a different rule prevails as between master and servant, where particular accidents or mishaps may be guarded against by special contract. (*Story on Agency*, 453, *e.* 3 *Seld.* 498.) But in the view I have taken of another point it will not be necessary further to consider this position, at the present time. No *special contract*, however, between the principal and agent is to be inferred from such an allegation.

The great question is, whether the plaintiff should have averred *actual notice* to the defendants, of the defects complained of, or some of them. In *Keegan* v. *The Western Rail Road Corporation*, (4 *Seld.* 175,) Ch. J. Ruggles, in delivering the opinion of the court of appeals, says that "the cases in which it has been held that a principal is not liable to one agent or servant for an injury sustained by him in consequence of the misfeasance or negligence of another agent or servant of the same principal while engaged in the same general business, were not applicable to the case then under consideration. That they were only applicable where the injury complained of happened without any actual fault or misconduct of the company, either in the act which caused the injury or in the selection or

employment of the agent by whose fault it did happen. That whenever the injury results from the actual *negligence or misfeasance* of the principal he is liable, as well in the case of one of his servants as in any other." He further remarks that in the case of third persons, the actual fault of the agent is imputed to the principal on grounds of public policy, but that it was unnecessary to dwell upon the reasons, because the referee had found, as matter of fact, that the injury resulted directly from the negligence or misconduct of the defendants themselves, in continuing to use the engine having a defective and dangerous boiler, *after notice of its dangerous condition.* It will be perceived that the court lay great stress, and seem to base their opinion, upon the fact found, that notice had been given to the company of the defects in the boiler. The referee reported that during the two months preceding the explosion the engineer of the locomotive had reported to the defendants, on five or six different occasions, the defective condition of the boiler, and that those defects were entered on the books of the defendants kept for that purpose. Upon this state of facts, it was very properly urged and insisted, upon the argument, that the defendants having persisted in running the engine under circumstances showing an utter blindness to every thing except their own pecuniary profit, were guilty not only of negligence but *intentional wrong;* it was an act dangerous to human life, and knowingly done. *Knowledge* was considered one of the essential elements necessary to maintain the action. And why has this difference in the rule between strangers and servants obtained, from the earliest cases down? The reason, says *Story*, in his treatise on *Agency*, § 453, *d. and e.*, is that "the mere relation of master and servant, or principal and agent, creates no contract, and therefore no duty on the part of the principal. In such cases the servant takes upon himself the hazard of an injury which may arise in the course of his business or employment. The master is no doubt bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief. But the servant is not bound to risk his safety in the service of his

master, and may if he thinks fit, decline any service in which he may have reason to apprehend injury to himself. And in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it, as the master."

These remarks I consider as peculiarly appropriate to the present case. The plaintiff's intestate was the engineer upon the very locomotive which contained the defects complained of. It was his duty to have made known the defects to the company, as in the case of *Keegan* v. *The Western Rail Road Corporation.* He was responsible as well to the public as the company, for not making them known. It was his duty, and it was confided to him by his employers, to guard against all accidents liable to happen by the escape of horses or other animals upon the track, through the defect of fences or otherwise. He would be *more likely* to know of occasional defects in fences or cattle-guards or bridges than the company or their officers elsewhere located. He was bound at all times to exercise all diligence and caution against the happening of accidents, and to thus protect himself as well as his passengers and the property intrusted to his care. He had the knowledge, or the means of knowledge, within his own power. He might have required special indemnity against all risks, or he might have given notice to the company and have thrown the risk upon them. (3 *Mees. & Wels.* 1. *Story on Agency*, 451 *d*, *e*. *Parsons on Contracts*, 528.) "The master," says the latter, "is not responsible for an accident happening in the course of his service, unless the master knew that it exposed the servant to peculiar danger, and the servant did not." (*And see Add on Cont.* 744.)

The servant, then, to be entitled to recover, as seems to be established by all the cases, must prove actual notice to the principal of the defects complained of as causing the injury, or some of them. And in order to be able to prove notice, he must allege it in his complaint. It is argued that no notice was averred in the case of *Keegan.* But the evidence was received by the referee without objection. And the question did

not arise in the court of appeals, whether it was necessary to aver that fact or not. If the objection had been taken at the proper time the referee must have ruled it necessary, or have violated a well known rule of pleading, that it is necessary to aver whatever is material or necessary to prove.

It is further insisted that the defendants in this case must have known whether they *built* the fences or not, and that they are charged with *not building*. The plaintiff, however, avers that the horse escaped on to the road in consequence of a *defect* in the fence between a certain lot and the rail road, which it was the duty of the defendants to maintain and keep in repair; they admitting that the fence had been built but had become defective and out of repair. The same remark is applicable as to the cattle-guards, and the bridge. All which defects, as before remarked, were more likely to have been known to the engineer than to the company, particularly the insufficiency of the *cow-catcher* attached to the locomotive, to permit which he might be deemed to have been grossly negligent himself. Without further pursuing this subject, I am satisfied that the judge was right at special term in sustaining the demurrer, and I am for affirming the order, with $10 costs.

Order affirmed.

[Schenectady General Term, May 7, 1855. *C. L. Allen*, *Bockes* and *James*, Justices.]

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## Underhill *vs.* The Saratoga and Washington Rail Road Company.

No precise technical words are required, to make a condition precedent or subsequent. The construction must always be founded on the intention of the parties.

If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act, after taking possession then the condition is subsequent.

Underhill *v.* Saratoga and Washington Rail Road Co.

Where a grant was *upon the condition* that the grantees should build and maintain a water tight embankment or dam over a certain brook crossing the land conveyed, as part of their line of road, and that the said embankment or dam, with the flood-gates and sluice-ways therein, might be used for hydraulic purposes, by the grantors, their heirs and assigns; and it was covenanted that the grantees should not be liable for any damages which the grantors should sustain in case of a break in the dam or an overflow thereof, unless the same should happen through the gross negligence or willful misfeasance of the grantees, but that the grantees should repair all damages which the dam or embankment should at any time sustain, forthwith; *it was held* that the condition was *subsequent*, and that the effect of the deed was to vest the fee simple of the estate in the grantees, subject to be defeated by a neglect or refusal to perform the condition.

*Held also*, that the effect of an omission to perform the condition, by the grantees was to give the grantors, or in case of their death, their heirs, the right of entry; but that no action could be maintained by an assignee of the grantors, to recover the land; whether the breach was before or after the assignment.

*Held further*, that by a general assignment, made by the grantors, to a third person, of all their property, rights, claims and demands, the condition was gone, and the grantees obtained an absolute estate, and were discharged from the condition, and all claim for damages for a breach of it.

*And held*, that the condition could not be construed to be a *covenant*, so as to enable the assignee of the grantors to maintain an action to recover damages for a breach thereof.

Nor can the assignee, in such a case, maintain an action for damages, on the ground of an *implied covenant*

Where a plaintiff, in his complaint and on the trial, claims to recover *land* by way of *forfeiture*, on the ground of a failure to perform a *condition* on which it was granted, he will be considered as waiving any claim for damages for *breach of a covenant* contained in the grant. He cannot be allowed to pursue both remedies at the same time, and in the same action.

A condition in a deed, when explicit words are used, creating such condition, will not be construed into a covenant, except to avoid a forfeiture.

THIS was an action to recover the possession of certain lands, and also damages for the breach of certain covenants contained in a deed. The complaint averred that on or about the 30th day of April, 1847, Henry H. Lawrence and Richard Lawrence, being seised and possessed of the lands and premises in question, with their wives conveyed to the defendants the said land comprised and included within, and bounded by, the two outward lines of the rail road constructed or to be constructed by the defendants between the villages of Saratoga Springs and

Whitehall, where the road crossed or ran upon the land owned or possessed by the said Lawrences, in the town of Saratoga Springs, being 60 feet in width, "*upon the condition however*, that the said parties of the second part in the said deed named, should build and maintain a water-tight embankment, or dam, over the ravine across the Loughbury creek, as a part of their line of road, and that the said embankment or dam, with the flood-gates and sluice-ways therein might be used for hydraulic purposes by the said parties of the first part, their heirs and assigns." The complaint further averred that there was also a covenant by the grantees to "*repair* all damages which the said dam or embankment should at any time sustain, *forthwith*." That the defendants, immediately after the execution of the deed, entered into the possession of the land conveyed, and ever since had been and still were in possession thereof. That they had not kept and fulfilled the conditions of the deed, and had not built or maintained a water-tight embankment or dam over the said Loughbury creek, but had wholly neglected and refused so to do. That on the 13th of March, 1848, the Lawrences sold and conveyed to the plaintiff the land, premises, covenants and conditions, and all their real and personal property, rights in action, interest and effects growing out of said deed and its covenants. That by reason of such breach and neglect the plaintiff, since said deed to him, and the Lawrences, before that time, had been deprived of the use of the embankment or dam for hydraulic and other purposes; and he claimed a forfeiture and to recover possession, and also the damages sustained by the plaintiff since the conveyance to him.

The answer, after averring that the defendants did not execute the deed and were not bound by the covenants contained in it, denied the several allegations in the complaint, except as to the execution of the deed and the taking possession of the premises, and averred a performance of the conditions on the part of the defendants. It then set up various defenses not necessary to be stated here; upon which the reply took issue.

The action was tried at the Saratoga circuit in June, 1855, and upon the trial the plaintiff insisted that he had proved that

the defendants had not constructed a water-tight enbankment or dam, such as was required by the condition, and claimed damages therefor, and also possession of the land, by reason of the forfeiture for breach of the condition. It appeared in evidence that the Lawrences were permitted, by an agreement dated Oct. 15, 1844, under the hands of Messrs. Davison and Marvin, two of the defendants' directors, to construct the dam themselves, and the defendants, by a resolution of the board, on the 6th of December, 1844, gave them liberty to construct it; and that *one of the Lawrences built the dam.* No erection or location of any machinery was shown or pretended. The plaintiff also proved the conveyance to him, which was by virtue of a general deed of assignment, in trust for the benefit of creditors, containing a clause as follows: "All and singular the lands, tenements, hereditaments, real estate and chattels real of the said party of the first part [the Lawrences] and of each of them, wherever the same may be situated, and also all the goods, wares, merchandise, bonds, notes, accounts and debts due and owing to the said parties of the first part and each of them, in what manner soever secured, and all books and vouchers relating thereto, and all the personal property of the said parties of the first part, of every kind and description, wherever the same may be, in trust however," &c.

The plaintiff having rested, the defendants' counsel claimed that the plaintiff should be required to elect whether he would claim a forfeiture of the land, or whether he would claim damages for a breach of the covenant; that he could not claim both. The plaintiff's counsel then insisted that he was entitled to recover the land, on the ground of a failure to perform the condition in the deed. That the consideration was precedent and subsequent, and that for a breach of it an action could be maintained by the plaintiff, as assignee of the grantors, and that if he was not entitled to maintain the action on the ground of forfeiture he was entitled to recover damages for a violation of the condition and covenant. The court decided that the plaintiff could not recover the land, or the estate, for a breach of the condition in the deed whether such breach occurred before or

after the conveyance to the plaintiff, and that such breach of the condition was not assignable. The plaintiff's counsel excepted.

The counsel for the defendants then moved for a nonsuit, upon the following grounds: 1. That the plaintiff, under the evidence, could not maintain his action, for the recovery of the land, on the ground of a breach of the condition, because the right of action, if any, could not be assigned. 2. That if assignable, such right would not pass to the plaintiff, without an express grant, and that there was not sufficient evidence of such grant. 3. That the plaintiff, upon the evidence, was not entitled to maintain an action for the recovery of the land upon the ground of forfeiture. 4. That the condition in the deed to the defendants of the premises in question, could only be reserved to the grantor *and his heirs*. The conveyence by the grantors, to the plaintiff, upon the evidence, did not entitle the plaintiff to re-enter or recover the land. 5. That the plaintiff could not maintain an action to recover damages for a breach of the condition or covenants, for they had not executed the deed, and this action could not be maintained upon any implied covenant or agreement. The court ordered a nonsuit, and the plaintiff's counsel excepted. A motion was now made for a new trial, upon a bill of exceptions.

*Edwards & Meads*, for the plaintiff.

*W. L. F. Warren* and *W. A. Beach*, for the defendants.

*By the Court*, C. L. ALLEN, J. There can be little doubt, I apprehend, but that the provision in the deed was a condition subsequent. No precise technical words are required to make a condition precedent or subsequent. The construction must always be founded on the intention of the parties. (3 *Cruise's Dig.* 468, *tit.* 32, *ch.* 24, *sec.* 70. 1 *id. tit.* 13, *ch.* 1, *sec.* 10.) The same words have been construed both ways, and much has been made to depend on the order of time in which the conditions are to be performed. If the act or condition required does not necessarily precede the vesting of the estate, but may ac

company or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent. (*Blacksmith* v. *Fellows*, 3 *Seld.* 401, 414. *Parmelee and others* v. *The Oswego and Syracuse Rail Road Co.*, 2 *id.* 74, 80. *Martin* v. *Ballou*, 13 *Barb.* 119 133. *Grant* v. *Johnson*, 1 *Seld.* 247. *Tompkins* v. *Elliot*, 5 *Wend.* 496. 1 *Hilliard's Ab.* 247, § 5. *Finlay* v. *King*, 3 *Peters*, 346, 374. *Stuyvesant* v. *The Mayor of New York*, 11 *Paige*, 414.)

Do the acts required by the condition in this case necessarily precede the vesting of the estate? The grant was "*upon the condition* that the parties of the second part in the said deed named, should build and maintain a water-tight embankment or dam over the ravine across the Loughbury brook, as a part of their line of road," and "that the said embankment or dam, with the flood-gates and sluice-ways therein, might be used for hydraulic purposes by the said *parties of the first part, their heirs and assigns.*" A further covenant was inserted in the deed, that the parties of the second part were not to be liable for any damages which the parties of the first part, their heirs or assigns, should or might sustain in case of a break of the dam or overflow of the same, unless they should happen through the gross negligence or willful misfeasance of the parties of the second part; but "the *said parties of the second part* should repair all damages which the dam or embankment should at any time sustain, forthwith." It is pretty clear, from the phraseology of the condition, that the acts required might not only follow the vesting of the estate, but that they almost necessarily did, or that at all events it was the evident intention of the parties that the dam or embankment would involve much time and expense, and require the possession of the land on the part of the defendants. There was no limit to the time of its performance, and consequently the defendants would be allowed a reasonable time to construct and complete the work. And it was

never contemplated that during all the time necessary for such an act the defendants should be prevented from taking possession of the land, and delayed in the construction of their road, which might otherwise be progressing at the same time that the condition in the deed was being complied with. I am of opinion, therefore, that the condition was subsequent, and that the effect of the deed was to vest the fee simple of the estate in the defendants, subject to be defeated by a neglect or refusal to perform the condition. The cases already cited establish this proposition, and it is directly decided in *Ludlow* v. *The New York and Harlem Rail Road Co.*, (12 *Barb.* 440.) And see *Wynne* v. *Wynne*, (2 *Man. & Gran.* 10; 40 *Eng. Com. L. Rep.* 237.)

The plaintiff's counsel, while he rather seems to concede that the condition is subsequent, insists that it was broken, and that the plaintiff, who is the grantee of the Messrs. Lawrence the grantors to the defendants, acquired all their rights and is entitled to recover the land. This right, he contends, even before breach and independently of any statute, was a "possibility *coupled with an interest*," and assignable in equity or by devise, and *a fortiori* after breach. The case of *Jackson* v. *Waldron*, (13 *Wend.* 178,) cited by the counsel, does not, in my judgment, fully sustain his position. At all events it does not decide that such a right is assignable. It is true that Chancellor Walworth, in delivering his opinion in the court of errors, in that case, remarks, (*pp.* 194, 195) that "it appears to be finally settled, in England, that possibilities coupled with an interest, although not technically clothed with an estate in possession, reversion or remainder, are in the nature of *remainders*, and as such are devisable." Yet he adds, "it is still questionable by many of the English elementary writers, whether such estates are in fact assignable." And he proceeds to remark that it is said in a note to *Shelley's case* that where a possibility is coupled with an interest, "as where the person who is to take upon the happening of the contingency is fixed and ascertained, it may not only be bound by estoppel or contract but may also be *released*, pass under the bargain and sale of

commissioners of bankrupts, or be devised, *though it cannot be granted or transferred by the ordinary rules of the common law.*" After a review of several cases cited, he comes to the conclusion that whatsoever is *devisable* may be *granted*. This conclusion, however, was not adopted by a majority of the court, and the judgment of the supreme court in that case was affirmed, against the opinion and vote of the chancellor. Senator Tracy, who delivered the leading opinion in favor of affirmance, makes the significant remark (*p.* 221 of the case,) "The rule seems to be now admitted that every interest or estate in land may be released to the terre-tenant, though it might not be grantable to a stranger. Thus if a man grants a limited fee, the possibility of reverter on the determination of the limited estate continues in him, but he cannot make a *valid grant of it* to a stranger, *though it is a possibility coupled with an interest.* He however can release it, and it seems to be the amount of the decisions in *Manning's case*, (8 *Coke*, 187,) and *Lampet's case*, (10 *Coke*, 46,) that a possibility coupled with an interest, is not assignable, though it be releaseable," and, he finally adds, "descendible and devisable."

The cases cited in 5 *Pick.* 528, and 21 *id.* 215, 223, decide no more than that such an interest is descendible and devisable, but do not, as I understand, undertake to go the length of establishing the proposition that it is assignable. Besides, although the decisions in that state are here held as high authorities, yet when the adjudications of their courts come in conflict with those of our own state, (as will be found to be the case here, if they are considered as deciding the point contended for by the plaintiff in his favor) those of our own courts must prevail.

The chancellor, in the case of *Lawrence* v. *Bayard*, (7 *Paige*, 70, 75,) remarks that the revised statutes (1 *R. S.* 725, § 35,) have declared in express terms that expectant estates are *descendible*, *devisable* and *alienable*, in the same manner as estates in possession, and that by an examination of the several provisions of the revised statutes it will be seen that by the term *expectant estates* the legislature intended to include every present right or interest, either vested or contingent,

which may by possibility vest in possession at a future day, and that the mooted question whether a mere perpetuity coupled with an interest is capable of being conveyed or assigned at law, is therefore forever put at rest in this state." This decision was after that of *Jackson* v. *Waldron*, though that case came out of the court of errors in 1834, after the revised statutes took effect. The action, however, was commenced in 1828. But this court, in the case of *Nicoll* v. *The New York and Erie Rail Road Company*, decided in 1852, long after the revised statutes took effect, and since the decision in 7th Paige, have adjudged that conditions in a deed can only be reserved for the grantor and his heirs, and that a conveyance made by the grantor, to a third person, either *before* or *after* breach of the condition, will not carry with it a right to enter for a condition broken. The court say "conditions in a deed can only be reserved for the grantor and his heirs. A stranger cannot take advantage of them. And the reason is that the estate is not defeated although the condition be broken, until entry by the grantor or his heirs, and nothing which lies in action, entry or re-entry can be granted over, in order to discourage maintenance." And the court further remark that "when a grant in fee has been made, depending upon a condition subsequent, no one can re-enter, on breach of the condition, except the *grantor or his heirs*, and a conveyance made by the grantor to a third person, before or after breach of the condition, will not carry with it a right to re-enter for condition broken. This rule, however, does not extend to leases in fee, reserving rents, nor to leases for life or years. (1 *R. S.* 747, §§ 23, 24, 25.) Kent, in his Commentaries, (*vol.* 4, *p.* 127,) lays down the same doctrine, which is supported in 1 *Cruise's Digest*, tit. 13, ch. 1, § 17, and same tit. §§ 53, 65. And see 1 *Saund.* 287 *d.* (*n.*) 16. 3 *Denio*, 334, 360. *Bacon's Abr. tit. Condition, E.* 1 *Wend.* 388, 395. 2 *Hill*, 491, 495. *Shep. Touch.* 158. 12 *Barb.* 440, 2, 3. The case then, in 12*th Barbour*, supported as it seems to be by abundant authority, if recognized as law, and it has not been reversed on appeal, is, it appears to me, decisive of the present.

But the counsel for the plaintiff insists that both the cases in 12*th Barbour* are different in principle, and were both decided on a technical condition that unless the road was built within a short period the grant, in each case, should be void; recognizing, I suppose, the well established principle that conditions involving forfeiture are not favored in law, and "are construed strictly because they tend to destroy estates, and are odious." (4 *Kent*, 128, 129.) I am unable to discover the distinction sought to be taken, nor why the exact point was not raised and passed upon by the court in both those cases.

It is urged that the old rule forbidding such assignments *at law* was in aid of the policy of maintenance, which does not prevail here. In the case in 22*d Wendell*, 405, cited by the counsel, one of the members of the court of errors, in delivering his opinion, said it was insisted on the argument that the legislature had intentionally repealed all statutory provisions on the subject, except as to the buying and selling of pretended titles to land, yet he remarks, "I do not think, however, that agreements actually champertous, as where a stranger to the subject of litigation who has no interest therein in law or equity, or in expectancy, by the ties of *blood or affinity*, or who agrees to assist in embroiling his neighbors in litigation, or in carrying their suits through the different courts, can be enforced in courts of justice." In other words, the statute (2 *R. S.* 691, § 6) providing that no person shall buy or sell or in any manner procure, or make, or take any promise or covenant to convey any pretended right or title to property unless the grantor is in possession thereof, &c. is yet in full force.

I come to the conclusion that the effect of the omission to perform the condition by the defendant was to give the grantors, or in case of their death their heirs, the right of entry; but that no action can be maintained by the assignee, to recover the land, whether the breach was before or after the assignment, and that the court was therefore right in so holding at the circuit.

The remaining question which arises is, whether the plaintiff is entitled to recover damages *for breach of the condition.*

It will be proper, preparatory to entering into the consideration of this question, to look at the complaint and ascertain what is the particular cause of action, and what relief is demanded. After setting forth the condition and the covenant to repair, the complaint avers that the defendant has not fulfilled the said covenants and conditions, on his part, in the said first mentioned deed contained, but on the contrary have not built or maintained a water-tight embankment or dam over the said ravine across the Loughbury brook, and according to the true intent and meaning of the said deed and of the said conditions and covenants thereof, but have hitherto wholly refused so to do. "And the said plaintiff further says that by reason of the failure of the said defendants to build and maintain the said water-tight embankment the said Lawrences were, previous to and up to the time of making the assignment, and the said plaintiff ever since the said assignment to him, has been deprived of the use of the said embankment or dam, and of the flood-gate and sluice-way therein, for hydraulic purposes, and also of the use of the water power and other rights and privileges," enumerating them, and concluding by averring that the Lawrences *before* and the plaintiff, *since* the assignment, have sustained damages by reason thereof to the amount of $10,000, and demanding that the said defendants be adjudged to have broken the said condition, and also the said covenants on their part in the said deed contained," and that the estate may be forfeited and revert to the plaintiff, his heirs and assigns, and that he may recover the possession, "*together with the said damages* so as aforesaid sustained by the said Lawrences and assigned to the plaintiff, and also the damages so as aforesaid sustained by the plaintiff since the said assignment to him, with costs," &c.

It will be perceived that the whole gravamen of the complaint is, that the *condition to build* the dam was broken and a forfeiture claimed because thereof. No averment is made of a breach of the covenant to repair, or claim put forth for damages on that ground. It would have been deemed preposterous, probably, to have presented such a claim, when no dam had been constructed, to be repaired, and when the

whole burthen of the action was to recover the possession of the premises, for a non-performance of the very condition which must have been complied with, at least to such an extent as that the dam had been constructed so as to need repairs, which the defendants had neglected to make. The whole claim for damages is, as I understand the complaint, for losses sustained by the Lawrences and the plaintiff by reason of the failure of the defendants to build or construct a sufficient dam. This view brings us to the question, can the condition be construed into a covenant, so that the plaintiff can be entitled to maintain this action for a breach of such covenant? It was not seriously contended, I believe, upon the argument, that there was any express covenant in the grant, except the one to repair; and it has been seen that no damages can be claimed for a breach of that covenant, as none could in this case exist. And in the view I take of the question it is unnecessary to decide whether the defendants executed the deed or not; or whether it would be necessary, in order to sustain an action. It is sufficient, in my judgment, that the plaintiff neither sets up nor proves any *express* covenant. Nor do I think the condition can be construed into a covenant. The words are explicit, *creating a condition.* The intent of the parties must govern, and the rules as to ascertaining and determining that intent are the same as those relating to covenants. It was clearly the intent, as to the condition, that a forfeiture should accrue, in case of a failure to perform. It was a grant of the estate *only upon that condition.* The plaintiff has so treated it, not only in his complaint, but on the trial. He insisted at the circuit—on being required to elect whether he would claim a forfeiture of the estate, or damages for a violation of the covenant—that he was entitled to recover the *land* on the ground of a failure to *perform the condition* on which the grant was made; that the condition was both precedent and subsequent, and that for a breach an action could be maintained by the plaintiff as assignee of the grantors; and that if he was not entitled to maintain the action on that ground, he was entitled to recover damages for a violation of the condition and covenant. The court held

that he was not entitled to recover the land for a breach of the condition of the deed, and granted a nonsuit. The whole claim was on the ground of forfeiture, or damages for not complying with the condition to build, which the plaintiff sought for that purpose to construe into a covenant. I do not perceive, if he fails to establish the first claim, how he can sustain himself on the second. By insisting upon his claim of forfeiture, and to recover the land, he must waive the claim for damages for breach of the covenant, and cannot be allowed to pursue both remedies at the same time and in the same action. (9 *Paige*, 430.) Besides, it has been held that a condition in a deed when explicit words are used, creating such condition, will not be construed into a covenant, except to avoid a forfeiture. (1 *Hil. Abr.* 299. *Gray* v. *Blanchard*, 8 *Pick.* 284.) As before remarked, there is no express covenant. But it is argued that there is an express covenant to repair, which runs with the land. This, as a naked proposition, no one, probably, disputes. (*Norman* v. *Wells*, 17 *Wend.* 136, *and various other cases.*) But the difficulty here is, that the plaintiff does not seek, nor can he claim, to recover upon a breach of that covenant. He relies upon a breach of the condition alone, which it has been seen, cannot be construed into a covenant. But if it could, it would not, in my judgment, run with the reversion. The parties are now possessed of different interests. If I am correct in the former position I have taken, that by the assignment by the Lawrences to the plaintiff the condition was gone, and the defendants obtained an absolute estate, it follows that they are discharged from the condition and all damages for a breach of it. (*Shep. Touch.* 158. *And see Bleecker* v. *Smith*, 13 *Wend*, 530, 533.) The statute (1 *R. S.* 747, §§ 17, 18, 19) does not aid the plaintiff. The provisions of those sections only extend to covenants in leases reserving rents, for life or years, or in fee.

I pass to the only remaining question, which is, can the action be sustained upon the ground of an implied covenant? It has been shown that the condition was reserved to the grantors and their heirs, and did not include their assigns. That by the

assignment the condition was discharged forever. Being thus extinguished, how can it be revived, either as a condition or a covenant? It appears to me the whole right of action upon the condition is gone, so far as the plaintiff is concerned. But the statute (1 *R. S.* 738, § 140) declares that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. This statute has received a construction, in the case of *Kinney* v. *Watts*, (14 *Wend.* 38,) in which the court say that the language is clear, concise and peremptory, that no covenant whatever shall be implied in any conveyance of real estate, and that there is no room for construction. (*And see* 8 *Paige*, 597, 599.)

In every view which I have taken of this case I can discover no ground upon which the plaintiff is entitled to recover, and I am of opinion that the motion to set aside the nonsuit and for a new trial, should be denied with costs.

New trial denied.

[Schenectady General Term, May 7, 1855. *C. L. Allen*, *Bockes* and *James*, Justices.]

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20 468
33 594
34 287
36 276
38 407
38 415
41 357
46 656
57 147
13h 600
40h 105
14a 85
25a 297
28a 462
40k 592
67a 277

## The New York Central Insurance Company *vs.* The National Protection Insurance Company.

A contract for insurance, made by an individual who acts as the agent of both parties in making the same, is voidable in a court of equity, at the election of the principals, or either of them.

Where an agent, without the knowledge of his principal, is acting also in behalf of the other party, in making a contract, the presumption of fraud is not an unreasonable one. But the principle forbidding such contracts is a mere rule of equity. If the proper forms have been obsrved, the conveyance is good at law, and the title passes. The contract is not void, but only voidable.

But this defense cannot be relied on in an action upon a policy of insurance, if it is not set up in the answer.

No proof can be offered of facts not put in issue by the pleadings.

A defendant who makes a defense by answer, must, besides answering the plain

tiff's case as made by the complaint, state in his answer every matter of defense of which he intends to avail himself.

Where conditions of insurance, annexed to the policy, are by an express provision in the policy, made a part of the contract, they have the same force and effect as if contained in the body of the policy.

One of the conditions of a policy was that no insurance should be binding until the actual payment of the premium. The money was in a bank where the agent was in the habit of making his deposits, deposited to the credit of the insured. The cashier told the agent of the insurers, at the time the arrangement for the insurance was made, that he could have the money. The agent directed him to let it lie; saying that when he wanted the money he would draw for it. It was not in fact drawn by him until after the fire. *Held* that the agent had waived a strict compliance with the condition, and that he had authority to do so.

Where a policy is issued and delivered to the insured, and the premium is acknowledged in the policy as actually received, this will be held as conclusive, upon the fact of payment, and will bind the insurer.

Where a fire occurred on the 15th of June, and the insured knew of it on the 18th, and sent notice to the insurers, by mail, on the 23d; *Held* that this was a sufficient compliance with a condition in the policy, requiring notice of loss to be given *forthwith*.

Such a provision has never been construed literally to require notice on the day. It has always been held that due diligence, under all the circumstances, was all that was required.

A general agent of an insurance company for effecting insurances in their behalf, while acting within the general scope of his authority in making an insurance, will bind his principals, although he departs from his instructions; unless the assured have notice that he is exceeding his authority.

It is a general rule that whatever is known to an agent must be presumed to be known to the principal.

But *it seems* this rule is confined to that class of cases where the knowledge of the fact comes to the agent while he is acting for his principal, in the course of the very transaction which becomes the subject of the suit.

Hence the fact that an agent by whom an insurance is effected, had previously received instructions from his principals the insurers, will not be regarded as notice to the insured of those instructions and that he had exceeded his authority, although the agent was at the time of making the insurance, the secretary of the insured.

In an action upon a policy of reinsurance, the reinsurer is liable to the insurer for the costs and expenses incurred in defending a suit brought by the party originally insured.

THIS was an appeal, by the defendants, from a judgment entered against them at a special term, after a trial at the circuit. The action was upon a policy of reinsurance.

*I. E. Dewey*, for the plaintiffs.

*Charles S. Lester*, for the defendants.

*By the Court*, MASON, J. This is an action upon a policy of reinsurance for $2000, executed by the defendants to the plaintiffs through their agent, G. W. Stevens, who was also the agent of the plaintiffs in making the contract of insurance. The risk was selected and the rates of insurance fixed by Stevens, and the question is, whether this action can be maintained upon the policy. It becomes important to inquire whether such a contract, made by an agent who acts as the agent of both parties in making the contract, is absolutely void at common law, or whether it is voidable in a court of law; or whether it is only voidable in a court of equity. The rule is well settled, both in England and this country, that such a contract is voidable in a court of equity at the election of the principal. The principle is illustrated in the case of an agent employed to sell. If such agent become himself the purchaser or the agent of another; or if he be an agent to buy, and he become himself the seller, or the agent of another in making the sale, the principal may avoid the sale or the purchase, in equity. If he come to the court upon a timely application, upon the fact being alleged and proved, the court will presume the transaction was injurious and consequently fraudulent; and this presumption cannot be overcome unless it can be shown that the principal, furnished with all the knowledge the agent possessed, gave him previous authority to become purchaser or seller, or afterwards assented to such purchase or sale. (*Campbell* v. *Walker*, 5 *Ves.* 678. 1 *Ves. jun.* 287. *Massey* v. *Davies*, 2 *id.* 317. 1 *Russ. & Mylne*, 58. 2 *Myl. & K.* 819. *Story on Agency*, §§ 9, 192, 211, 214, 210. *Dunl. Paley on Agency*, 33, 34. 1 *Mason*, 341. 6 *Pick.* 196. 2 *John. Ch.* 252. 5 *id.* 388. *Hopk. Ch.* 515. 9 *Paige*, 237. 4 *Con. R.* 717. 5 *Lond. Jurist*, 18. *Smith's Merc. Law*, 101. 13 *Ves.* 103. 8 *id.* 502. 9 *id.* 234. 12 *id.* 355. 3 *Bro. C. C.* 119. 5 *Paige*, 650. 2 *Mylne & Cr.* 374. *Liver. on Agency*, 423. 4 *Mylne & Cr.* 134. 6 *Ves.* 625. 1 *Story's Eq. Jur.*

§§ 315, 316. 2 *Mason*, 369. 1 *Jac. & Wal.* 294. 1 *John. Ch.* 27. 2 *id.* 394. 3 *Ves.* 740. 4 *Denio*, 575. *Angell on Fire and Life Ins.* 454, 455. *Parsons on Contracts*, 74, 75.) The rule seems to be founded on the danger of imposition in such cases, and the presumption which a court of equity indulges of the existence of fraud which is inaccessible to the eye of the court, and consequently in equity such agreements are regarded as constructively fraudulent. (9 *Paige*, 242. 4 *Kent's Com.* 438, 3*d ed.*) The rule is a well settled one, and the presumption is not an unreasonable one in a court governed by the principles of equity. The principal in fact has bargained for the exercise of all the skill, ability and industry of his agent, and he is entitled to demand the exertion of this in his own favor. (*Parsons on Cont.* 74, 75.) Where the agent, unbeknown to his principal, is acting equally in behalf of the other party, the presumption is not an unreasonable one. This principle, however, like the one that a trustee cannot be the purchaser of an estate, is a mere rule of equity. If the proper forms have been observed, the conveyance is good at law, and the title passes. The contract is not void, but only voidable. (5 *Metcalf*, 467. 5 *John.* 43, 48. 1 *Bing.* 396, 400, 401. 5 *Ves.* 678. 13 *id.* 603. 7 *Moore*, 315. 5 *Pick.* 521. 3 *Ves.* 740, 751. 2 *John. Ch.* 740, 751. 9 *Ves.* 248. 10 *id.* 381. 14 *John.* 414, 415. 2 *Gill & John.* 227. 4 *id.* 376. 3 *Harr. & John.* 38. *Parsons on Cont.* 75, 76, *note j.* 1 *Peters' C. C. R.* 368. 6 *Halst.* 585. 8 *Cowen*, 361.) No case, I apprehend, can be found where a court of law has pronounced such a conveyance absolutely void. (14 *John.* 418. 5 *id.* 48. *Mackintosh* v. *Barber*, 1 *Bing.* 50. 7 *Moore*, 315. 5 *Pick.* 519, 521. 5 *Metc.* 467.) The rule of which we have been speaking is applicable to all persons placed in situations of trust or confidence with reference to the subject matter of the contract, and embraces trustees, executors, administrators, guardians, agents and factors, attorneys, solicitors, &c. It embraces all who come within the principle. (9 *Paige*, 241.) There is no such rule, in equity even, as that a person standing in such trust relation, cannot himself buy at his own sale. He may purchase and take the title, subject how-

ever to the option of the *cestui que trust*, if he come in a reasonable time, to have the sale declared invalid. (*Campbell* v. *Walker*, 5 *Ves.* 678, *and cases note a.* *Lister* v. *Lister*, 6 *id.* 631. *Ex parte Lacey*, 6 *id.* 625. 15 *Pick.* 31. 7 *id.* 1. 10 *id.* 77. 2 *John. Ch.* 252, 261, 266. 4 *Gill & John.* 376. *Parsons on Cont.* 76.) It is not important to inquire whether the executory contract made by an agent who acts and contracts for both parties can be avoided in a court of law; for in this court the defendant may make any defense which he may have, be it legal or equitable; and there is no doubt the defense insisted on in this case is a good one if the defendants can be allowed to set it up under the answer which he has interposed. The complaint alleges that on or about the 6th June, 1852, the plaintiffs procured the defendants to insure, or reinsure the plaintiffs to the amount of $2000 upon this property insured by the plaintiffs, and that the defendants in consideration of ten dollars to them paid by the plaintiffs, did make and execute a policy of insurance to the plaintiffs, and caused the same to be signed by their president, James M. Marvin, and to be attested by their secretary, J. M. Wheeler, and delivered the same to the plaintiffs, and that the same was duly countersigned by the defendants' agent, George F. Stevens, who was duly authorized for that purpose, &c. The following are the only allegations in the answer upon which a defense can claim to be predicated: "And the defendants further answering deny that on or about the 6th day of June, 1852, the said plaintiffs procured these defendants to insure, or reinsure the said plaintiffs as stated in the complaint, and deny that they made and executed a policy of insurance or delivered the same to the plaintiffs as stated in said complaint, and deny that Geo. F. Stevens was the agent of the defendants, or was authorized to countersign the policy of insurance mentioned and set forth in the complaint." The evidence in the case shows that Stevens was the duly constituted agent of the defendants for making contracts of insurance, and that the defendants, for that purpose, had furnished him with blank insurance policies signed by the president and secretary of the defendants, and that Stevens, as such agent of the defendants, made the said

contract of insurance and issued the said policy of insurance for and in behalf of the defendants. The real ground of defense therefore is, not that the defendants did not make such a policy of insurance to the plaintiffs, for they did make, through their agent, just such a contract as is alleged in the complaint. Nor is the real ground of the defense that Stevens was not the agent of the defendants, authorized to countersign the policy. The real defense to the action is, that notwithstanding such a contract has been made by the defendants, through their general agent for making contracts of insurance, and countersigned, yet that the contract in the case under consideration is not binding upon the defendants, because the same was fraudulently entered into by Stevens, their agent, he acting in the same matter as agent of the plaintiffs. Not that such a contract is absolutely void, but that the defendants may avoid it for the reasons above stated. I do not think such a defense can be interposed under this answer. The rule is well settled under both our former and present system of pleadings, that no proof can be offered of facts not put in issue by the pleadings. The reason of the rule is, that the adverse party may be apprised against what suggestion he is to prepare his proofs. (2 *Comst.* 361, 506, *and cases there referred to.*) This rule is equally applicable to the defendant who makes a defense by answer, and it requires him, besides answering the plaintiff's case made by his complaint, to state in his answer any matter of defense of which he intends to avail himself; and he cannot avail himself of such matter of defense if it be not set up in his answer. (2 *Comst.* 506.) Facts proved but not pleaded are not available to the party proving them; for the court pronounces its judgment, "*secundum allegata et probata.*" (2 *Comst.* 506. 2 *Selden*, 179.) If a party would avoid a contract for fraud he must set up such defense in his answer. (*Bailey* v. *Ryder*, 1 *Selden, notes*, 15. 4 *Barb.* 272. 6 *John.* 565. 12 *Barb.* 348.) In *Imham* v. *Child*, Ld. Thurlow would not listen to any evidence that went to prove a deed fraudulent because there was no allegation of fraud in the bill. (1 *Bro. C. C.* 94.) And the court of appeals held precisely the

same in *Bailey* v. *Ryder*, (*supra.*) Such defense not being set up in the answer, the defendant cannot avail himself of it.

The next objection to the plaintiffs' right of recovery in this case is, that the insurance policy was not binding upon the defendants for the reason that the premium was not paid. The conditions are, by an express provision in the policy, made a part of the contract. (6 *Wend.* 488.) And they have therefore, the same force and effect as if contained in the body of the policy. (2 *Denio*, 75.) The second condition annexed is, that "*no insurance whether original or continued, shall be binding until the actual payment of the premium.*" This is a condition in the policy, and a condition in a fire no less than in a marine policy, not complied with, defeats the policy. (1 *Phil. on Ins.* 416. 2 *Denio*, 75, 81. 5 *id.* 326.) In the present case the premium was not in fact paid to Stevens till after the fire. The money was in the bank, under the control of Mr. Olcott, the cashier, deposited to the credit of the treasuer of the plaintiffs, and Mr. Olcott told Stevens he could have the money at the time the arrangement for the insurance was made, and Stevens told him to let it lie, and when he wanted the money he would draw for it. The money was not in fact drawn by him till after the fire, and from the 7th to the 10th of July. Olcott was in the habit of receiving and paying out the premiums for the plaintiffs and acted in behalf of the company. He had therefore, I am inclined to think, authority to pay out the moneys in deposit belonging to the plaintiffs for such object, and would at any time have paid this premium upon Mr. Stevens's check, had he wished to draw it; but Stevens preferred to have the money remain in the bank, as that was the place where he made his deposits, until he wished to make his remittance to the defendants. Stevens, therefore, chose to waive a strict compliance with this condition in the policy, and trust to the cashier paying his check, knowing that the cashier had money in deposit belonging to the plaintiffs which he was authorized to apply to such purposes. I think Stevens had authority to waive compliance with this condition in the policy. (1 *Phil. on Ins.* 22, 23, §§ 23, 24.) And that he did so is most manifest

But the money was paid to Stevens after the fire. He was the defendants' agent. His authority was not revoked, and the money was received before the disapproval of the insurance. I am inclined to think, therefore, the defendants are bound; for although both the contract and policy are subsequent to the destruction of the property, the insurer may be bound. (12 *Wheat.* 408. 4 *Cowen*, 643, 665.) But again, this policy was issued and delivered to the plaintiffs, and the premium is acknowledged in the policy as actually received. This, upon the authorities, seems to be held as conclusive, and to bind the insurer. (3 *Kent*, 260, 3*d ed.* 1 *Camp.* 532. 3 *Taunt.* 493. 1 *Sandf. S. C. R.* 58. 1 *Phil. on Ins.* §§ 514, 515. 2 *id.* §§ 2116, 1849, 1993.)

The defendants cannot avail themselves of the objection taken upon the trial that the plaintiffs did not give such notice of the loss to the defendants, as is required by the conditions of the policy; for the reason that no such issue is presented by the pleadings. The complaint alleges due and proper notice given of said loss to the defendants upon the receipt of notice thereof, by the plaintiffs, and this averment stands entirely undenied by the answer, and for the purposes of the action, therefore, is deemed admitted. But if we regard the issue as made by the pleadings, the notice was sufficient. The fire occurred on the 15th of June and the plaintiffs knew of it on the 18th and they sent notice to the defendants by mail on the 23d. This was a sufficient compliance with the condition of the policy requiring notice of the loss to be given "*forthwith.*" This provision has never been construed literally to require notice on the day. It has always been held that due diligence under all the circumstances was all that was required. There must not be any unreasonable delay or laches in giving the notice. (*Inman* v. *The Western Fire Ins. Co.* 12 *Wend.* 452.)

We will now proceed to consider the second point raised by the defendants on their motion for a nonsuit, and which is that Stevens being the secretary of the plaintiffs they were chargeable with notice of his instructions from the defendants.

and consequently with notice that he exceeded his authority. Stevens being the general agent of the defendants for effecting insurances in their behalf, and having acted in the general scope of his authority in making this contract of insurance, he clearly bound the defendants, notwithstanding he departed from his instructions; unless the plaintiffs had notice that he was exceeding his authority. (4 *Cowen*, 645. 2 *Kent*, 620. 23 *Wend.* 18.) The rule is a general one that whatever is known to the agent must be presumed to be known to the principal. (*Dunlap's Paley on Agency*, 260.) I am inclined to think, however, that the better opinion is, that this rule is confined to that class of cases where the knowledge of the fact comes to the agent while he is acting for his principal in the course of the very transaction which becomes the subject of the suit. (2 *Hill*, 452.) If this be so, then the fact that Stevens had before this received instructions as the agent of the defendants should not be regarded as a notice to the plaintiffs, although Stevens was the plaintiffs' secretary at the time. But the real objection was not raised that as Stevens acted as the agent of the defendants in making this very contract and as he had knowledge of the instructions this was known to the plaintiffs. The precise points wherein he exceeded his authority, or did not follow instructions were stated on the motion for a nonsuit, and are, first, that he took less premium than was required; 2d, that he exceeded his authority in not requiring an application, and in not sending to the defendants a copy of the resolutions of the plaintiffs, and also in ante-dating the policy to the 6th of June. It is, perhaps, a sufficient answer to these objections to say that none of these defenses are set up in the answer, and that the defendants cannot be allowed to raise them, for this reason. (17 *Wend.* 199, *and cases referred to above.*)

The only remaining question is, whether the defendants are liable upon this policy of reinsurance for the costs and expenses of the suit brought against the plaintiffs by the Etna Insurance Company. I am free to confess that upon a fair construction of the defendants' contract, I am at a loss to see upon what principle

they can be held, and yet the authorities would seem to hold them. (1 *Arnould on Ins.* 289. 2 *Phil. on Ins.* 749, 676, § 2145. *Hastie* v. *De Peyster*, 3 *Caines*, 190. 1 *Story's C. C.* 458, 462. 3 *Kent*, 278, 3*d ed.*) I am of opinion, for the reasons stated, that the judgment should be affirmed.

[Madison General Term, September 12, 1854. *Gray*, *Shankland* and *Mason*, Justices.]

## Briggs *vs.* Briggs and Vose.

20 477
124a 112
20 477
22 651
34 450
1L 492
15a 471
53a 242

Where goods are consigned to joint factors the consignees are in the nature of co-obligors and each is liable for the whole.

And although, upon a dissolution of the partnership, one retires and the other sells the goods and receives the avails, yet an action lies against both for not fulfilling their duty in selling and accounting; and they may both be held liable for not accounting.

In an action against several defendants who are jointly and severally liable, either of them may set off promissory notes executed by the plaintiff, or may avail himself thereof by way of counter-claim.

APPEAL from a judgment rendered at a special term. The facts appear in the opinion of the court.

*Walbridge & Finch*, for the plaintiff.

*Ferris & Cushing*, for the defendants.

*By the Court*, Mason, J. The defendants were copartners in the commission business, in the city of Albany, and the plaintiff consigned to them as such commission merchants, a quantity of lumber to sell on commission. After the lumber was received and a part of it sold, the copartnership between the defendants was dissolved and the defendant Briggs ceased to have any thing to do with the business. The defendant Vose sold the lumber and did not account and pay over. The plaintiff heard

of the dissolution about the last of July and before the defendant Vose had sold the balance of the lumber; but it does not appear from the evidence, that he knew whether the lumber was sold or not. The question presented for our adjudication, is whether the defendant Briggs is jointly liable to the plaintiff for the avails of the lumber sold by Vose after the dissolution of the firm. The defendants are both liable. If goods are consigned to joint factors, they are in the nature of co-obligors and are answerable for one another for the whole. (*Godfrey* v. *Sanders*, 3 *Wilson*, 114. 6 *Bac. Abr.* 563, *Bouv. ed. tit. Merchant and Merchandise, letter B.* 5 *Com. Dig.* 72, *note f, tit. Merchant, Factor, B.*) Joint factors are liable for each other's receipt, and it is no discharge of one of two joint factors that the business was wholly transacted by the other with the knowledge of the principal. (*Godfrey* v. *Sanders*, 3 *Wilson*, 73, 114. *Gore* v. *Dawbeney*, 2 *Leon.* 75. *Cowper*, 814, *in note. Dunlap's Paley on Agency*, 52. *Story on Agency*, 281.) A joint consignment and acceptance of the goods makes each liable to account for the whole. (*Dunlap's Paley on Agency*, 53.) And although upon a dissolution of the partnership one retires and the other sells the goods and receives the avails, yet an action lies against both for not fulfilling their duty in selling and accounting, and they may be both held liable for not accounting. (*Wells and others* v. *Ross*, 7 *Taunt.* 403. *Dunlap's Paley on Agency*, 53, *note w.*)

Upon the trial of this cause the defendant Enos Briggs offered in evidence as an offset or counter-claim three promissory notes made by the plaintiff, and payable to Enos Briggs or bearer; two of them for $117.56 each, and one for $100. The execution of these notes was admitted, but the plaintiff's counsel objected to their being received in evidence or allowed by the referee, on the ground that they were not a proper offset or counter-claim in this action. These notes could not be allowed as a set-off prior to the amendment of the code in 1852. They were not a legal offset under the revised statutes. I am inclined to think, however, that they are admissible as a set-off or counter-claim under §§ 149, 150 of the code as amended in 1852.

A counter-claim is defined to be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the specified causes of action; and the 2d subdivision provides that in an action upon contract any other cause of action, arising also on contract, and existing at the commencement of the action, shall be a counter-claim. (*Code*, § 150.) The only restriction is that it must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action. The present action is one of this kind as is expressly held in the case of *The People* v. *Cram and White*, (8 *How. Pr. R.* 151.) These notes should have been allowed as a counter-claim by the referee. The case of *Parsons and Wales* v. *Nash*, (8 *How. Pr. R.* 454,) is in point, and determines the very question presented in this case. It is true that is a special term decision, but I think Judge Marvin has given the only true construction to this section of the code. I do not see how it can be read otherwise. The judgment must be reversed and a new trial ordered; costs to abide the event.

[Chemung General Term, May 8, 1855. *Shankland*, *Gray* and *Mason*, Justices.]

## Partenheimer *vs.* Van Order.

20 479
59 425
9h 520
64s 147

Where cows, belonging to several owners, are found in the garden of an individual, committing a trespass, each owner is liable for the damage done by his own cow, and for no more.

And in the absence of all proof as to the amount of damage done by each cow, the law will infer that the cattle did equal damage.

APPEAL, by the defendant, from a judgment of a county court.

*Bruyn & Williams*, for the plaintiff.

*Walbridge & Finch*, for the defendant.

*By the Court*, MASON, J. This is an action of trespass, brought in a justice's court, to recover damages for the defendant's cow getting into the plaintiff's garden and destroying his vegetables, &c. The evidence in the case shows that the defendant's cow, with some nineteen others, was found in the plaintiff's garden, and that the whole damage done by all of the cows, taking the highest estimate of any of the witnesses, was $20. The jury found a verdict against the defendant for $20 damages; for which sum the justice rendered judgment, with costs of suit. The defendant appealed to the county court, where the judgment of the justice was affirmed, and the defendant has appealed to this court. The law is well settled, that the defendant is only liable for the damages done by his own cow, and not liable for the damages done by the cows of others jointly with his own. (17 *Wend.* 562. 2 *Conn. R.* 206. 2 *Verm. Rep.* 9. 1 *Denio*, 495, 501. 20 *Pick.* 477.) In cases like the present, the law fixes a distinct and definite rule of damages. It gives to the party injured his direct pecuniary los, sand no more. (*Greenl. Ev.* § 253. *Sedg. on Dam.* 37. 11 *Barb.* 370.) In this case the jury either mistook the rule of damages, or else they intentionally disregarded it. In either case they have violated a settled principle of law. The party was as much entitled to have this rule of law observed in the trial of this cause, as any other upon which his rights depended. It will not do to say that as it was not proved that the other cows did any of the damage, the judgment therefore should be affirmed. The only evidence in the case to show that the defendant's cow did this damage, consists in the proof that his cow was in the garden with the others, and that the damage was done by these cows. In the case of *Rudd* v. *Shever*, (20 *Pick.* 479,) in considering this question of damages done by the dogs of different owners, the court say, "*if it could be proved* what damage was done by one dog and what by the other, there would be no difficulty, and on failure of such proof each owner might be liable for an equal share of the damage, if it should appear that the dogs were of equal power to do mischief and there were no circumstances to render it probable that greater damage was done by one dog

than by the other." In the absence of all proof, it seems to me that this is a sensible rule, and that we should infer that the cattle did equal damage, in the absence of any proof as to how much was done by each. The law cannot certainly be so unreasonable as to presume that one cow did it all. The judgments of the county court and justice must be reversed.

[Otsego General Term, July 10, 1855. *Shankland*, *Gray* and *Mason*, Justices.]

20 481
25 252
64 548
14b 142
28a 147

## Luther French *vs.* Philip E. New.

Parties, after having by their bonds of submission to arbitration, required the award to be *in writing*, and subscribed by the arbitrators, may waive that requirement, by parol, and receive a *verbal award*, which will be binding on both.

Thus, where a submission required the award to be made in writing under the hands of the arbitrators, subscribed by them or any two of them, and attested by a subscribing witness, but before the arbitrators made any award, the parties said to them they had substituted other writings which they had drawn up and executed, under seal, in place of a formal award in writing, and that all they, the parties, wanted to know, was *how much* was awarded, and they could fix the amount, in the instrument, as they had agreed; and that they did not want the award in writing, but wished the arbitrators to award *verbally*; it was held that the parties had waived that part of the condition of the submission bond which required the award to be in writing.

Such an agreement for a parol award operates as a new submission; and the parties are *estopped* from saying that the parol award, made in pursuance of their directions, is void.

The principle that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned, applies to such a case.

Where a submission was in writing, under seal, to hear the evidence in reference to a certain lease, "to the end that all matters in controversy in that behalf, between the parties, should be finally concluded," &c., and a subsequent agreement between the parties recited that they had agreed "to submit their matters in controversy" to arbitration; *Held* that it was the intention of the parties that the arbitrators should pass upon all matters in reference to the lease; whether all the rent had become due or not; so as to end all controversy between them which had arisen, or might arise, out of that instrument; and that consequently the award was not void although it embraced the rent not then due, and damages subsequently to accrue, under the lease.

*Held also*, that parol evidence that the rent yet to become due, and other claims, were taken into consideration by the arbitrators, was proper, for the purpose of showing whether the arbitrators took into consideration matters beyond the submission, or not.

Where there is a submission, by writing under seal, of all matters relating to a lease, to arbitration, and a subsequently executed parol agreement between the parties, consenting that the arbitrators may make a *verbal* award, an award by parol will discharge the lease.

Proof that, previous to a submission of matters respecting a lease, the rent due thereon &c., one of the arbitrators counseled with the defendant, and told him his rent was too high, will not show such corruption, partiality or gross misbehavior as would invalidate the award at law; and is therefore inadmissible.

Such evidence cannot be given by the arbitrator himself; on the ground that it would go to impeach his award.

Where a submission purported to be made pursuant to the provisions of the statute for determining controversies by arbitration, but it contained no clause agreeing that a judgment should be entered in a summary manner upon the award to be made; *Held* that this was not a submission under the statute. (1 *R. S.* 541.)

THIS was an action brought to recover of the defendant the last two installments of rent due upon a *lease under seal*, executed by the defendant to the plaintiff, commencing on the 1st day of April, 1849, and ending April 1, 1852. The plaintiff claimed to recover the amount of the rent and interest, and also damages, in consequence of the non-performance by the defendant of certain covenants in the lease. The execution of the lease, which was dated March 16, 1849, was admitted by the pleadings, and it was read in evidence on the trial at the Saratoga circuit, in Oct. 1854. The defendant set up in his answer, and proved on the trial, that after the first and before the second installment of rent became due, on the 27th day of March, 1852, the plaintiff on the one part, and the defendant George E. New on the other part, entered into arbitration bonds, dated on that day, which recited that a controversy existed between the parties, and that the arbitrators were "to hear the evidence, testimony and proofs (exclusive of any other witness) of the aforesaid parties, *in reference to a certain lease given on or about the 16th day of March*, 1849, *by Luther French to Philip E. New*," and concluded as follows: "So as the award of the said arbitrators be made in writing, subscribed by them or any two of them,

and attested by a subscribing witness, ready to be delivered to the said parties on or before the 10th day of April, 1852." "To the end that all matters in controversy in that behalf *between the said parties* shall be finally concluded, pursuant to the provisions of the statute, for *determining controversies by arbitration*." The defendant also gave in evidence two instruments in writing bearing even date with the arbitration bonds, but evidently executed after them, inasmuch as they recited the execution of said bonds of submission, except that Lyndes Emerson was named in said instruments as one of the arbitrators, instead of Levi Rowley These instruments provided the mode and times of payment of the sum that should be awarded to the plaintiff, instead of leaving it to be fixed and regulated in the award, and only making it necessary for the arbitrators to award the sum which they should decide the defendant should pay to the plaintiff. The arbitrators did not make any award in writing. But it appeared in evidence that they all met and were sworn as arbitrators, in the latter part of March, 1852, and that the parties had a hearing before them. The lease was produced before them, and the matters were finally submitted to them on the 31st day of March, 1852. The parties made their statements, among which the plaintiff said he claimed for rent due on the lease, and the last year's rent; also for clover seed, timothy seed, 8 acres of rye, a stack of oats, and wood delivered at the door. The defendant insisted that he paid too much rent for the farm. He also made claims, on his part. At the time they submitted and before the parties left the room to the arbitrators, the plaintiff told them to mix it up in any way to do justice to themselves. About the time the parties left the room, Green, one of the arbitrators, said he supposed the award must be in writing. The plaintiff said, "*You need not bring the award, or judgment, in, in writing.* We have a writing drawn up, and we merely want to know how much the award is, and we will fix the award on the instrument as we have agreed. All we want the arbitrators to do is to fix the amount, and declare it verbally." The defendant also said, at the same time, that the award need not be in writing. The arbitrators were then

left alone, and after they had agreed upon their award they notified the parties, who appeared before them, and the award, which was unanimous, was declared in their presence. The arbitrators awarded that the defendant should pay the plaintiff $260. And the plaintiff was to pay the arbitrators. He paid two of them immediately, and the third one afterwards. After the award was declared, the plaintiff said he would see his attorney, Mr. Hoag. The latter soon after came into the room, and drew up and served on the arbitrators a written revocation of the submission. The plaintiff offered to show by one of the arbitrators, that previous to the submission he, the arbitrator, had counseled with the defendant and told him his rent was too high. This was objected to by the defendant's counsel and rejected by the judge, and the plaintiff's counsel excepted. The defendant offered to prove that he had tendered full performance of the award, on his part, according to the terms of the agreement executed after the submission bonds. This testimony was objected to as immaterial, and excluded by the judge. The evidence being closed, the judge inquired of the counsel if there was any question of fact which either of them desired to submit, in case he should hold the award valid, and was answered there was not. The defendant's counsel then moved the court to nonsuit the plaintiff; which motion was granted, on the ground that the award was valid and was a bar to the action. The plaintiff's counsel excepted, and the court ordered that the case be heard in the first instance at general term. A motion was now made to set aside the nonsuit, and for a new trial.

*J. T. Carr* and *A. Pond*, for the plaintiff.

*Merrill & McKindley*, for the defendant.

*By the Court*, C. L. Allen, P. J. It is insisted on the part of the plaintiff, that in order to make a valid award, the arbitrators must pursue the authority contained in the submission, strictly, as to the form, manner and time of its execution. There is little doubt but that the parties could give to the

arbitrators such powers as they pleased, and that they (the arbitrators) were required to do as they were directed by the submission bond. This, as a general principle, cannot be disputed. (*Allen* v. *Galpin*, 9 *Barb.* 246, 250. 11 *John.* 133. 6 *id.* 14. *Cowen & Hill's Notes*, 1030.) The great question in the case is, could the parties, after having required the award to be in writing, waive that requirement by parol, and receive a verbal award which would be binding on *both*? In the case of *Perkins* v. *Wing*, (10 *John.* 143,) the condition of the bond was that the award should be in writing ready to be delivered to the *parties*, or any of them requiring the same, on or before the first of September. The arbitrators, before the day, made their award in writing, and read it over to the parties, who appeared to be satisfied, and one of them paid a part of the award, and did not then demand a duplicate, but on the day did demand a duplicate, or copy, which was refused. In an action on the award, the plea was no award. The court said, although the fact of demand and refusal should have been pleaded specially, yet if it had been properly in issue, the evidence was sufficient to show that the defendants had admitted a delivery or waived the necessity of any. That when the award was read and declared, and the defendant promised to perform it, and did in fact perform it, that was a consummation of the business, and the defendants were concluded from alleging afterwards, that the award was not delivered according to the condition of the bond. That they were bound to speak then, at the time of the publication, and when the arbitrators were upon the point of concluding and dispersing, if they required further notice, publication and delivery. That no circumstances could be stronger from which to infer an acquiescence in that mode of delivery, and a *waiver* of the necessity of one more formal. The case of *Sellick* v. *Adams*, (15 *John.* 197,) decided that where sworn copies of the award are delivered to the parties, by the arbitrators, *and received without objection*, this will be deemed a waiver of their right to receive the original award. So it was held to be a waiver, if one of the parties should say to the arbitrators they need make no counterpart, as he would not receive it. (*Buck* v. *Wadsworth*, 1

*Hill*, 321, citing with approbation *Sellick* v. *Adams*. And see *Howard* v. *Sexton*, 1 *Denio*, 440.) The case in 1 Hill was after the revised statutes regulating arbitrations, and yet it referred to and sanctioned the cases above cited from Johnson. It was probably the intention of the parties in this case that the arbitration should be under the statute. (2 *R. S.* 541, § 1, *et seq.*) This is pretty evident from the concluding clause in the submission bonds, providing that all matters in controversy between the parties should be finally concluded "*pursuant to the provisions of the statute* for determining controversies by arbitration." And yet there was no clause in the submission agreeing that a judgment should be entered in a summary manner upon the award to be made in pursuance of the submission, as is required by the section just quoted. This was held to be necessary by the court of errors, in the case of *Wells* v. *Lain*, (15 *Wend.* 99.) And the chancellor, in *Bloomer* v. *Sherman*, (5 *Paige*, 575, 578,) intimates that such was the opinion of the court in the former case, though he differed from a majority of the court, and decided, in the latter case, that the 23d section of the act, declaring that neither party shall have power to revoke the powers of the arbitrators, after the cause shall have been finally submitted to them by the parties, was applicable to all cases of submission to arbitration. *Cope* v. *Gilbert*, (4 *Denio*, 347,) sanctions this last construction. We must follow, however, the decision of the court of errors, and hold, with that court, that this was not a submission under the statute. It was however in writing, under seal, and required the award to be in writing, subscribed by the arbitrators or any two of them. And the question returns, could this requisition be waived, and the award be made *verbally*, as requested and directed by the parties? It does not seem to be disputed that a parol submission may be followed by a parol award, or that a submission under seal may provide that the award may be made in writing under the hand of the arbitrators, without seal. (*Kyd on Awards*, 116, 227, 291. 2 *Greenl.* § 69, *&c.* 2 *Hill*, 271, *and notes.*) Where the submission does not require a written award, a verbal award is good, at common law. (2 *Barb. Ch. Rep.* 430.)

The submission in the present case required the award to be made in writing under the hands of the arbitrators, subscribed by them or any two of them, and attested by a subscribing witness. But before the arbitrators awarded, the parties, and particularly the plaintiff, said to them they had substituted other writings, which they had drawn up and executed under seal, in place of a formal award in writing, and all they wanted to know was how much the arbitrators awarded, and they could fix the amount, in the instrument, as they had agreed; that they did not wish the award in writing, but wished the arbitrators to award verbally. The instruments which they had thus executed and delivered to each other after the submission bond, after reciting the submission, promised and agreed how the amount awarded by the arbitrators to be due from the defendant to the plaintiff should be paid; leaving it only necessary for the arbitrators to report the amount which they should find. They undoubtedly directed the arbitrators to award the sum found, verbally, lest a written award should, as it well might, interfere with their last agreement. By those acts and directions I think they waived that part of the condition of the submission bond requiring the award to be in writing. (*See cases before cited, and* 2 *Barb.* 316; 3 *Jo'n.* 528; 2 *Cowen & Hill's Notes*, 1030, *and cases cited.*) In *Bloomer* v. *Sherman*, where the time for making the award had been extended, the chancellor remarked that under a submission by bond the time might be enlarged, by an agreement not under seal. And although in such case an action upon the bond itself could not be maintained, yet that the party injured by the breach of the agreement, or the non-performance of the award, must seek his remedy by a suit upon the submission implied in the new agreement taken in connection with the bond, or by an action upon the award made in pursuance of such submission. And such was the doctrine in *Freeman* v. *Adams*, (9 *John.* 115,) and *Armstrong* v. *Masten*, (11 *id.* 189.) See also 3 *T. R.* 542, *note;* 2 *Wend.* 587; 8 *John.* 392; 4 *Cowen*, 566.) The case of *Fleming* v. *Gilbert*, (3 *John.* 528,) is a very strong one in favor of this doctrine of waiver, which the court

say must always rest in parol. And I do not find that the decision in that case has ever been shaken, but it was recognized as good law in *The Mayor of New York* v. *Butler*, (1 *Barb. S. C. Rep.* 325,) and by the court in this district, in the case of *Esmond* v. *Van Benschoten*, (12 *Barb.* 366, 370.)

But it is argued by the plaintiff's counsel that if the transaction, modified as it was by the parties, should be held by the court to amount to a parol award, or a parol submission and award, and the remedy, if any, would be upon the new agreement, or an action upon the award founded upon it, yet, that in this case, the lease, being a specialty, could not be changed or modified by the parol submission and award. The general principle for which the counsel contends is undoubtedly correct; as for instance, where by law the matter awarded is not arbitrable, or where from the subject of arbitration a writing is necessary to pass the right to the thing in demand, or to destroy the demand. (2 *Cow. & Hill's Notes*, 1025. *Lagsdon* v. *Roberts*, 3 *Monroe*, 257. *Kyd on Awards*. 52, 53.) But Mr. Kyd remarks that most of the cases which cannot thus be submitted of themselves, may, when joined with other things of an uncertain nature; because there is then an uncertainty about the whole of the disputes; as for instance, debt for arrears of rent ascertained by a lease for years. And it is to be remarked here, that there is an evident distinction between maintaining an action on the bond, where there has been a parol modification of it, and setting up the award as a discharge from a strict compliance with the covenants in the lease. In relation to the title to land, it is well said that the decision of arbitrators cannot convey the title to land, but an award upon the title is binding upon the parties, and estops the plaintiff or defendant from disputing the title affirmed by the award. "An award, whether it relates to the title, the possession, or the location or boundaries of land, has not the operation of a conveyance, but the parties are concluded by their agreement from disputing the location or title as settled by the arbitrators. *Its operation is in the nature of an estoppel* The award in such case is not offered as evidence of title. out to prevent

either party from setting up a title which had been negotiated by the arbitrators." (2 *Cowen & Hill's Notes*, 1037. *Jackson* v. *Gager*, 5 *Cowen*. 383, 387. *Cox* v. *Jagger*, 2 *id.* 638. *Robertson* v. *McNiel*, 12 *Wend.* 578. *Mitchell* v. *Bush*, 7 *Cowen*, 185. *Davy's Ex'rs* v. *Faw*, 7 *Cranch*, 171, 176.)

It is insisted that the original submission having been in writing under seal, and the alleged waiver or agreement dispensing with a written award, having been made before any breach of the conditions of the submission bond, was a nullity, within the case of *Howard* v. *Cooper*, (1 *Hill*, 44.) I am aware that Judge Cowen in that case remarked that it was out of the power of both parties to alter the legal effect of the sealed submission or a sealed contract, without seal. In that case an item contained in the submission had been withdrawn from the consideration of the arbitrators, by the agreement of the parties, by parol, and was not passed upon by them; and yet the court held that it could not thus be withdrawn, and that the award was conclusive upon it. It may be said here, in the first place, that the waiver was not entirely by parol, but by new instruments in writing executed by the parties under seal; and secondly, that the point of estoppel was not presented, or passed upon by the court. In *Coleman* v. *Wade*, (2 *Seld.* 44,) the award was in writing not under seal, relative to the guaranty of payment of rent reserved by lease under seal, and it was argued that the claim was not merged in the submission bond and award. The court held otherwise, and decided that the award would operate as a bar to an action commenced on the lease, and the guarantors were discharged. It may be said, too, within the principle of *Allen* v. *Jaquish*, (21 *Wend.* 628,) cited in that case, that here was an agreement *executed between* the parties, by which the arbitrators were authorized and directed to make an *oral* award. Besides, the agreement for a parol award, as before remarked, operated as a new submission. (9 *John.* 37, *and other cases above cited.*) But on the ground of estoppel, alone, I am satisfied that the plaintiff is concluded from saying that the award is void. He ought not, and cannot, be permitted to deny his own acts. He induced the defendant to

consent, with himself, to direct the arbitrators to make a parol award. They particularly stated that they would make it in writing, as required by the bond. The plaintiff affirmed in the most explicit terms, that they (the parties) had drawn up and executed an agreement between themselves, by which all matters were regulated except the sum which the arbitrators were to award, and that all they wanted was an award by parol. And when the award is thus pronounced pursuant to his own directions, and the defendant seeks to abide by it, and in part performs it by a prompt payment of the fees of the arbitrators, the plaintiff, finding it not conformable to his views or wishes, seeks the aid of the court to permit him to take advantage of his own wrong, although such a proceeding is contrary to upright dealing and good morals. Such a proceeding, in my judgment, would be rank injustice, and decidedly in conflict with all the cases on this subject. The principle laid down in *Fleming* v. *Gilbert*, before cited, "*that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned*," cannot be made more applicable than to the present case. (*And see* 8 *Ves.* 480; 3 *Hill*, 215; 2 *Seld.* 44, 279; 12 *Barb.* 370; 77 *Com. Law Rep.* 83.) It would in fact be allowing the plaintiff to perpetrate a fraud upon the arbitrators and upon the party.

The last objection which I shall notice is that the award was void as to the rent not due, and as to damages subsequently to accrue. It is said in support of this position, that a covenant cannot be discharged before breach but by an instrument under seal. And numerous authorities are cited by the plaintiff's counsel in support of this principle, and which cannot be disputed. The question is, whether they are applicable to the case which we are now considering. It must be borne in mind that the submission was in writing, under seal, "to hear the evidence, in reference to a certain lease given on or about the 16th day of March 1849, by Luther French to Philip E. New. To the end that all matters in controversy in that behalf between the said parties should be finally concluded," &c. The subsequent agreements E and F, also recite that the parties have 'this

day" [the day of the date of the submission bonds] agreed to "*submit their matters in controversy*" to arbitration. It is to be remarked, too, that the award was to be made on or before the 10th of April, 1852, ten days after the expiration of the lease. Now what was the evident intention of the parties, by this broad and comprehensive clause? Clearly that the arbitrators should pass upon all matters in reference to the lease; whether all the rent had become due or not; so as to end all controversy between them which had arisen, or might arise, out of that instrument. They intended, no doubt, to put an end to the lease, and to have a final settlement in relation to it. They evidently so understood the submission, as they went into all matters, before the arbitrators, as well relating to the rent due, as that which was to become due. They also litigated respecting the fire wood, oats, clover seed, and the eight acres of rye which must have been sown previously and was then on the ground. They finished the hearing on the 31st of March, only the day before the last rent would become due, and submitted all their matters to the arbitrators on that day. It is not for a moment to be supposed that they did not intend to, and did not in fact include the whole subject matter in relation to the lease, at that time. It is said it was proved by parol that the rent to become due, and other claims, were taken into consideration. This was proper, to show whether the arbitrators took into consideration matters beyond the submission, or not. And it showed what the intention of the parties was in the written submission. (7 *Hill*, 329. 1 *Barb.* 325. 4 *Denio*, 194. *And see Kyd on Awards*, 52, 53.)

But it is insisted that the parol award would not discharge the lease. This depends, again, upon the effect of the waiver, and upon the principle of estoppel, before discussed. If the submission included it, in all its terms, then if the award was good the lease was canceled and the plaintiff was driven to his remedy under the award. In *Delacroix* v. *Bulkley*, (13 *Wend.* 71, 75,) one of the cases relied upon by the plaintiff's counsel, Savage, Ch. J., in delivering the opinion of the court, remarks that the case of *Fleming* v. *Gilbert* proceeded upon the princi-

ple that the plaintiff *prevented* the defendant from performing his contract, and therefore should not take advantage of his failure; but that in the case he was then considering nothing was done or said by the plaintiff to prevent the defendant from a literal compliance with his contract. He adds, "It will be seen that there has been no innovation upon established principles, and that the law remains, as it has always existed, that a sealed executory contract cannot be released or rescinded by a parol executory contract; but that after breach of a sealed contract a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract." Here was an executed contract under seal, submitting all matters in relation to the lease, and a subsequently executed parol contract that the arbitrators might award as they did, before any attempt at revocation by parol. *Eddy* v. *Graves*, (23 *Wend.* 82,) and *Suydam* v. *Jones*, (10 *id.* 180,) do not, as I understand them, conflict with this principle.

Again, it is further argued that if the award could operate to extinguish the rent already due, it could not affect that subsequently to become due, and being void as to that, must be void in toto. It was not competent for the arbitrators to award upon claims not submitted to them. But it has been already shown that all matters in relation to the lease, as well the rent to become due as that already accrued, were included in the submission. The submission may be extended so as to include claims not yet due from the one to the other by previous contract, so as to carry out fully the intention of parties to settle all matters between them, as well those existing at the time as those which may arise afterwards. (*Kyd*, 142 *to* 149.)

The evident and clear intention of the party, as before remarked, was to extinguish the lease entirely. So the arbitrators understood, and awarded accordingly. And every reasonable intendment is to be made, to uphold their award. (19 *Wend.* 290. 1 *Seld.* 482.) The verbal award and the instruments E and F, may be construed together for the purpose of upholding it.

The evidence offered by the plaintiff was properly rejected. The offer did not go far enough. It did not go to show such

corruption, partiality or gross misbehavior as would invalidate the award at law. (1 *John. Ch. Rep.* 191, 276. 2 *id.* 551, *and various other cases.*) Besides, in this case, the offer was to show, by one of the arbitrators, that he had previously conversed with the defendant and told him his rent was too high, &c. This, if any thing, was an attempt to impeach the award of the arbitrators by one of themselves. This cannot be done. (*Van Cortlandt* v. *Underhill*, 17 *John.* 405. *Butler* v. *Mayor &c. of New York*, 1 *Barb. S. C. Rep.* 325.)

The motion to set aside the nonsuit and for a new trial, must be denied with costs.

[St. Lawrence General Term, September 3, 1855. *Hand, C. L. Allen* and *James*, Justices.]

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## Hunter and others *vs.* The Hudson River Iron and Machine Company.

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32 179
32 323
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65 288

In an action commenced under sections 206, &c. of the code, for the claim and delivery of personal property, where the complaint is in the form of the old declaration in replevin in the detinet, and charges that the defendants have become possessed of, and wrongfully detain the goods and chattels, and the plaintiffs proceed upon the ground that the title to the goods was never changed, but remained in them, because the same were purchased of the plaintiffs, and the delivery thereof procured, through the false representations of the vendees as to their solvency and credit, proof of the purchase of the goods by the agent of the defendants, by their direction, and that at that time the defendants were insolvent, is competent evidence, on the question of fraud.

In such an action it is not necessary the complaint should aver a demand of the goods; or that it should contain an allegation of the insolvency of the defendants, or of any of the facts going to establish the fraud.

It is sufficient if it is in the form of the old declaration in replevin in the detinet, and charges that the defendants have become possessed of, and wrongfully detain the goods and chattels in question.

Where a complaint and answer are both very general in point of form, but neither party demurs, and both have gone to trial with a full understanding of their rights, and neither party has been taken by surprise by the pleading of his adversary, and a full and fair investigation has been had, upon the merits,

such an *amendment* will be allowed as may be necessary to conform the complaint to the facts proved, and as will do substantial justice to both parties.

A sale and delivery of goods, procured through the false representations of the vendee in regard to his solvency and credit, passes no title whatever to the property, as between the parties; and the vendor may maintain an action, under the code, for the claim and delivery thereof.

In such an action, where it appears that the purchase was made by an agent, it is material for the plaintiff to show not only that the purchaser was insolvent, at the time of the purchase, but that such purchaser, or his agent, or both, knew of such insolvency. Hence the declarations of the agent, to third persons, made by him while acting for his principal and within the scope of his authority, and going to show such knowledge on the part of both principal and agent, are proper evidence.

Where a mortgage purports to have been executed by a corporation, through its treasurer, a certificate of acknowledgment stating that the treasurer testified, before the officer, that he was the treasurer of the corporation; that it was a corporation, but had no corporate seal; that he signed his name to the mortgage and affixed his own seal thereto, by the order and resolution of the trustees of said corporation duly made and given in writing; and that the same was executed by him as such treasurer, for the purposes therein mentioned, is *prima facie* sufficient evidence of the due execution of the mortgage, without producing and proving the resolution of the trustees; where the instrument is offered for the purpose of proving an act or acknowledgment of their pecuniary condition, by the mortgagors.

A principal is liable for the fraud or misconduct of his agent: and he not only cannot take any benefit from a misrepresentation, fraudulently made by the agent, but is bound to make compensation for injuries sustained by others, thereby. And this, although the principal may be innocent; provided the agent acted within the scope of his authority.

There need not be express authority to make a particular representation, but the authority may be implied, as incident to a general authority.

A general authority to an agent to purchase goods on credit, is an authority to make the necessary representations as to the credit and solvency of his principal

Such authority is necessarily incident to the power to purchase on credit.

And declarations made by the agent, while applying for goods on credit, as to the credit and solvency of his principal, are part of the *res gestæ*, and are equally obligatory upon the principal as if made by himself.

In such a case, even if the principal does not know, at the time, that the representatinns of his agent are false, he is liable to the vendor, upon the principle that of two innocent parties the one shall suffer who, by his *agent* causes the injury.

THIS action was commenced under section 206 of the code, for the claim and delivery of personal property. The complaint averred that the defendants were a manufacturing com

pany, formed under the act of March 22, 1811. That the company became possessed of, and wrongfully detained from the plaintiffs, the goods and chattels described in the schedule annexed to it, to the value of $1500, and demanded judgment for that amount. The answer denied the allegations in the complaint, and averred that the goods were wrongfully taken from the possession of the defendants by the plaintiffs or their order, and delivered to the plaintiffs on the 3d of June, 1854, and prayed for a return, with costs. The action was tried at the Washington circuit, in October, 1854, by a jury.

The plaintiffs, after proving the incorporation of the company, introduced as a witness *Charles Amerman*, who proved the partnership of the plaintiffs, which had existed since January, 1852. It was here admitted by the defendants' counsel that the property and goods described in the complaint were purchased of the plaintiffs by Simeon Mears, as the treasurer of the defendants, and by the direction and under the authority of the defendants, on the 18th of April, 1854; that the value thereof was $1118.03; and that at that time the company was insolvent for many thousand dollars. The defendants' counsel objected to the evidence thus admitted, on the ground that under the pleadings the evidence was not admissible, as there was no allegation of the facts, in the complaint. The objection was overruled, and the defendants' counsel excepted. The witness then further testified, among other things, as follows: "I was present at the time of the sale. I was acting as book-keeper. Mears came to the office of the plaintiffs, and after some general conversation with Mr. Hunter, one of the firm, he spoke about settling his account and purchasing more goods. In the meantime I had drawn out an outline or statement of his account. While thus occupied, Mr. Buckley (another member of the firm) came in and asked Mears how he was getting along. Mears answered that he was doing a good business, and had been. Mears wished to settle the outstanding account and give extended notes. He was acting as the agent of the company, all this time, and it is the account of the defendants of which I have been speaking. Buckley said iron was fetching such good prices the last year that he

ought not to ask an extension. *Mears replied that they were doing very well;* had been doing well; and spoke of another branch of the iron business—a rolling machine—that he was about to engage in, and wished Buckley to take an interest in it. Buckley declined." After some further conversation, the witness testified, it was finally agreed that three notes should be given by the defendant, one of $406 and over, which was payable in May following, and two others, for $280 each, at five and six months. Mears signed these notes as treasurer. Buckley then called Cowles, his salesman, and told him to sell Mears all the goods he wanted. The same day Mears, as agent, purchased goods of the plaintiffs, on credit, to the amount of upwards of $1300. On his cross-examination the witness testified that when Buckley first entered the store, that morning, the first salutation from him was "Hallo, Mears! How are you getting along?" He said, "We are, and have been, doing a good business," or "we are doing a good business, and have been doing a good business." Buckley told him he supposed he had come down to purchase goods, and he said he had. Buckley said, "I suppose you are yet doing well." Mears replied "Yes," or "certainly."

Mr. *Cowles*, the salesman of the plaintiffs, testified that after receiving directions from Buckley, as testified to by Amerman, he sold Mears, as agent for the defendants, on the 18th of April, 1854, goods to the value of about $1400, and that he afterwards identified a portion of the goods, to the amount of $1118.03, on the bank of the canal, which were delivered to the sheriff, for the plaintiffs, and which were afterwards sold by the plaintiffs.

*William H. Dyke*, another witness sworn on the part of the plaintiffs, testified that he was connected with the firm of Hammond and others, at Crown Point, called the Crown Point Iron Company. This testimony was objected to as immaterial, but the objection was overruled, and the defendants' counsel excepted. The witness further testified that his company had large dealings with the defendants, and that there was a balance due them from the defendants, on the 18th of April, 1854, of from $10,000 to $20,000, which was not paid when it fell due. In relation to that indebtedness, the witness said he had a conver-

sation with Mears, the first week in April of that year, and was asked what the conversation was. The question was objected to by the defendants' counsel, but the objection was overruled, and the defendants' counsel excepted. The witness testified that Mears expressed the inability of the company to pay this debt, amounting at that time to between eleven and twelve thousand dollars, and more coming due in a day or two, and wished for an extension of time. The witness made the remark that there was between four and five thousand dollars under protest. Mears said it was impossible to pay, and remarked *that if he could not get an extension* from creditors he would have to stop business, and *give up the property for the benefit of creditors.* He, Mears, engaged to come to Crown Point the next week and make an exhibit of the affairs of the company to Hammond. He did not come, at the time appointed, but did come the forepart of May following, and made a statement to Hammond, by which he said that the indebtedness of the company was from seventy to seventy-eight thousand dollars, and that the amount of the assets was from thirty to forty thousand dollars.

*Russell W. Pratt* testified for the plaintiffs that he was a trustee of the company in April, 1854, and was present after the middle of May of that year, when Mears made a statement orally, by items, of the indebtedness of the company. He stated the amount of the indebtedness to be about $80,000, and the assets at $20,000 or $21,000. This was a day or two before it was publicly known that the company had failed. It was not known to the witness that the company was insolvent, before this statement was made. The defendants' counsel offered to prove by this witness, that at the time of the conversation and interview testified to by him, none of the board of trustees present knew of the insolvency of the company, and that they all, severally except Mears, then expressed their surprise at the condition of the company, as then disclosed by Mears. The plaintiffs' counsel excepted to that part of the offer which went to prove the declarations of the company, as immaterial and improper. These were excluded, and the defendants' counsel excepted. No statement of the affairs of the company had been made for three years

previous to that time, although the witness had acted as secretary of the board for a portion of that time.

The plaintiffs offered in evidence an exemplified copy of a mortgage from the defendant to Jonathan S. Beach and Simeon Mears, dated Jan. 30, 1854, acknowledged June 5th, 1854. The mortgage was executed as follows:

"By order of the board of trustees, as per resolution of board, Fort Edward, Jan. 28, 1854.

For the Hudson River Iron and Machine Co.

S. MEARS, Treasurer." [L. S.]

The certificate of acknowledgment was as follows:

"State of New York, county of Washington, ss. On this 5th day of June, 1854, before me personally came Simeon Mears, treasurer of the Hudson River Iron and Machine Company, to me known, who being by me duly sworn, did depose and say that he resides in the village of Fort Edward, in said county, that he is the treasurer of the Hudson River Iron and Machine Company, that the said company is a corporation, but has no particular corporative seal, that he signed his name to the within, and affixed the seal thereto by the order and resolution of the trustees of the said corporation, duly made and given in writing, and that the same was executed by him as such treasurer, for the purposes therein mentioned.

EDWIN CRANE, Justice of the Peace."

The defendants' counsel objected to the introduction of this mortgage in evidence, unless the authority of Mears to execute it, from the company, was shown. They insisted that it was immaterial; and that the proof of authority, contained in the certificate, was not evidence, and that the paper was a nullity. The objections were overruled, and the defendants' counsel excepted. The mortgage was then read in evidence. It covered all the property, real and personal, of the defendants, and was a mortgage of indemnity to Mears and Beach for $2500, to secure them for having indorsed the paper of the defendants to that amount.

The plaintiffs here rested, and the defendants' counsel moved for a nonsuit on the following grounds: 1. That there was no

evidence to sustain the complaint. 2. That the declarations of Mears were made without authority, and if authorized, a fair construction would not enable the plaintiffs to maintain the suit. 3. That there was no proof that the Hudson River Iron and Machine Company knew they were false. 4. That there was a total absence of proof to show that the defendants were insolvent, at the time the representations were made. 5. That if they were insolvent, it did not make a case for relief in the present form. The judge denied the motion, and the defendants' counsel excepted.

*Simeon Mears* was then called as a witness by the defendants, and was objected to by the plaintiffs' counsel as interested. He was admitted by the court, and the defendants' counsel excepted. He testified that he was the Mears referred to by the witnesses; that he had no knowledge of the insolvency of the defendants, at the time of the purchase of the goods in question, but supposed they were doing a good business, at that time. He further testified, on cross-examination, that he was the treasurer of the company, and had the general charge of its affairs as to a particular department; that he did more of the business than any other individual. The notes of the company were given by him as treasurer. He had the general charge of making sales. The books were kept at the store by clerks, and were in his charge as treasurer. He frequently made entries on them and had daily access to them. He got the information from the books, which enabled him to make the statement testified to by Pratt. The goods in question formed part of the assets in that statement. That the company was indebted to him individually to between $12,000 and $20,000, though not in all that amount when the goods were purchased, and were otherwise largely indebted at that time, and had had several notes protested for a large amount, before the 18th of April, and had been in the habit of having their notes protested for the last eight years. They were also largely indebted to their hands; to one of whom, at least, they had been thus indebted for more than one year. Several suits had also been commenced against the company before the 18th of April. The extent of the business of the

company was about $100,000, and no examination or inventory of the state of its affairs for two years previous to the time of the making of the statement testified to by Pratt. The witness purchased, and received money, and paid debts, and did a large share of the other business. The trustees had or took no active oversight of it.

The proof being closed, the cause was summed up and submitted to the jury, under the charge of the court. They found a verdict for the plaintiffs for $232 damages, and assessed the value of the property taken at $1118.03.

A case was made, and judgment was suspended by the court, who ordered the case to be heard in the first instance at a general term. A motion was now made for a new trial.

*Hughes & Northrup* and *J. Gibson*, for the plaintiffs.

*A. D. Wait* and *E. H. Rosekrans*, for the defendants.

*By the Court*, C. L. Allen, J. Several objections were taken by the defendants' counsel on the trial of this action, and have been urged on the argument here, which it will be proper first to notice and dispose of in their order.

1. It is objected that the evidence of the purchase of the goods in question by Mears as the treasurer of the defendants, and by the direction and under the authority of the defendants, on the 18th of April, 1854, and that at that time the company was insolvent, was improperly received under the pleadings. The action was commenced under section 206 of the code, for the claim and delivery of personal property. The complaint is in the form of the old declaration in replevin in the detinet, and charges that the defendants have become possessed of and wrongfully detain the goods and chattels in question. The plaintiffs proceed upon the ground that the title to the goods was never changed, but remained in them, up to the time of the commencement of the action. They claim to succeed, and must succeed, if at all, on this ground alone. Hence they endeavored to prove that the alleged purchase was made by Mears

by the direction of the defendants while the company was largely insolvent. This was competent evidence, on the question of fraud. It is urged that the complaint is insufficient, in not averring a demand of the goods, and in containing no allegation of the insolvency of the defendants, or of any of the facts offered to be proved. This was not necessary. If the purchase was a fraudulent one, the plaintiffs still retained their legal right in the goods, unless, after discovering the act of fraud, they assented to the sale, either positively or by such delay in reclaiming them as would authorize the inference of an assent. The old cases fully establish the position that a sale and delivery of goods, procured through the false representations of the vendee in regard to his solvency and credit, passed no title whatever to the property, as between the parties, and the vendor might maintain either trover or trespass or replevin in the cepit or detinet, to recover their value, even though the actual possession was in another. In such cases the declaration was sufficient if in the usual form, in those actions. (*Ash* v. *Putnam*, 1 *Hill*, 302. *Cary* v. *Hotailing*, *Id.* 311. *Olmsted* v. *Hotailing*, *Id.* 317. *Matteawan Co.* v. *Bentley and others*, 13 *Barb.* 641. *Root* v. *French*, 13 *Wend.* 570.) The latter case was relied upon by the defendants' counsel to show the necessity of averring a demand, in the complaint. But it is believed that it establishes no such position. It decides with the plaintiffs that a fraudulent purchase of goods gives no title to the fraudulent purchaser, and that the vendor in such case may maintain replevin for the goods. It then goes further and affirms the principle that a bona fide purchaser from the vendee of goods obtained by fraud, without notice, will under certain circumstances, be protected. And, to maintain an action against him, a demand, in some cases, must be made before suit brought. But no such demand is necessary as against the fraudulent vendee. An action, in the nature of trespass, or for the wrongful detention of the property under sec. 206 of the code, may be maintained immediately; that section having been undoubtedly intended as a substitute for the old action of replevin. (6 *How*

339.) Besides, in this case, no objection was taken, on the trial, of want of proof of demand.

The cases are somewhat conflicting as to what is necessary to be averred in the complaint in an action like the present, under the code. But I think the weight of authority is with the plaintiff, as to the form which he has adopted in this case. A direct and issuable averment that the goods claimed were the property of the plaintiffs; nothing being necessary on their part to be returned, in order to restore the defendants to the condition in which they were at the time of the sale, has been held to be sufficient. (*Vandenburgh* v. *Van Valkenburgh*, 8 *Barb.* 217. 13 *id.* 641.) It has been too often decided that facts, and not the evidence of facts, should be pleaded. The testimony in this case went to show that the goods were fraudulently obtained, and that therefore the title to the property was not changed, and I think was properly received. The defendants might have required the complaint to be made more definite and certain, under sec. 160 of the code. And even if it should be held to have been necessary to set out the facts more fully, I am disposed, after trial, and when the party has had the full benefit of any defense which he chose to make, to grant the plaintiffs leave to amend, so as to conform their complaint to the facts proved. That portion of the answer which avers that the goods in question were the property of the defendants is as general as the complaint. Neither party demurred, and both have gone to trial with a full understanding of their rights. Neither has been taken by surprise by the pleading of his adversary. A full and fair investigation has been had, upon the merits, and such an amendment should be allowed as will do substantial justice to both. (*Code*, §§ 169, 173.)

2. It is further objected that the testimony of the witness Van Dyke was improperly received. It was material for the plaintiffs not only to show that the company was insolvent at the time of the purchase, but that the defendants, or Mears the agent, or both, knew of such insolvency. (*McCrackan* v. *Cholwell*, 4 *Seld.* 133.) The testimony of Van Dyke went to show this knowledge, on the part of both, and was therefore proper

It is said that the testimony only proved the declarations of Mears; that such declarations were not within the scope of his authority, even if an agent, and were therefore hearsay and immaterial. Even if this were so, they were proper to show knowledge in Mears, who afterwards testified, on the part of the defendants, that he did not know, at the time of the purchase, that the company was insolvent, and that he made the declarations to the plaintiffs which were proved, in good faith. But Mears was acting, at the time of those declarations, within the scope of his authority. He was transacting business with the witness as one of the firm of Hammond & Co. to whom the company was largely indebted, as their agent. He was endeavoring to obtain an extension of time, and as one inducement to the witness to consent, represented to him that unless time could be obtained the company must stop business and give up their property for the benefit of their creditors; that their indebtedness was from 75 to $78,000, and their assets amounted only to about 30 or $40,000. This conversation occurred the first week in April, a week or fortnight only before the purchase from the plaintiffs. The testimony, in my judgment, was clearly admissible, and the authorities hereafter cited abundantly show it.

3. It is insisted that the proof offered, that all the directors present at the time of the statement made by Mears, except him, expressed their surprise at the condition of the company, ought to have been received. The court permitted the defendants to show that none of those directors knew of the insolvency of the company, at that time, which could have been done by calling upon them to testify, as Pratt, one of them, had done. But the expression of their surprise was a matter wholly immaterial, and was properly rejected. It was a matter of no consequence, as will be hereafter shown, whether the defendants knew of their insolvency or not. But if it were, their expressing a surprise at Mears' statement would not show a want of knowledge on their part.

4. The next objection interposed by the defendants is that the mortgage was improperly received in evidence. The certificate of the justice states that Mears testified that he was the

treasurer of the company; that it was a corporation, but had no corporate seal; that he signed his name to the mortgage and affixed the seal (his seal) thereto, by the order and resolution of the trustees of said corporation, duly made and given in writing, and that the same was executed by him as such treasurer, for the purposes therein mentioned. In *Johnson* v. *Bush*, (3 *Barb. Ch. Rep.* 207, 233,) where the same objection was taken, as here, that the resolution of the board of directors ought to have been produced and proved, the chancellor decided that formerly the execution of the instrument under the corporate seal, if there was one, (and under the seal of the treasurer if there was no corporate seal,) was prima facie evidence of authority to execute the deed, which might be overcome by showing, either directly or circumstantially, that there was no authority, either general or specific, and that now it may be overcome by showing that there was no resolution of the board. The certificate in this case recites all that is necessary, in the first instance, and it would have been a very easy matter for the defendants to show that no such resolution had ever been passed, and that Mears swore falsely in so testifying. The mortgage was dated in January, 1854, but was not acknowledged until June of that year. Nevertheless, Mears, who was the treasurer, knew of its existence when it was executed, and it was not pretended that it was not made on the day it purports to bear date. It was properly received in evidence, therefore, even if not sufficiently proved as the act of the company, to show a full knowledge in Mears of the condition of the company on the day of its date. And it is not to be presumed, in the absence of all proof to the contrary, that Beach, who was involved with Mears in large liabilities for the company, did not know of its existence. This evidence was in a manner collateral, and was introduced to show an additional fact tending to prove the insolvency of the defendants, and a knowledge on the part of the company. It was not offered as between the parties to recover its amount, but to prove an act or *acknowledgment* of their own pecuniary condition. The mortgage was sufficiently proved for that purpose, and it was properly received in evidence.

These views dispose of all the primary objections, and bring us to the consideration of the only remaining question presented.

It is insisted that the motion for a nonsuit should have been granted upon the grounds urged upon the trial. The first ground in relation to the sufficiency of the complaint, has been already disposed of. The second, that the declarations of Mears were made without authority, and which is the principal one relied upon, remains to be considered. It has been already remarked that Mears was the treasurer and general agent of the company and was particularly employed to make the purchases of the goods which from time to time were effected, in New York and elsewhere, on credit. That he had the custody and control of the books, the making of the notes, and the transaction in short of all the principal business affairs. This is evident not only from his own testimony but from his acts which had been and were from time to time acquiesced in and sanctioned by the company. The other officers and stockholders depended on him for all information, in relation to its condition. Hence the assembling, and calling upon him for the statement to which he testified, and to which allusion has been before made. It was conceded on the argument that Mears was the treasurer, and that his powers were those of a general agent. But it was urged that although he had the power to make a contract for the purchase of goods, by the defendants, on credit, and could make and execute all the necessary notes and other papers as to the quantity purchased and the times of credit and payment, yet he had no authority to speak as to the credit of the company, so as to bind them; without an additional special authority. And the naked proposition is put forth, (for the argument certainly amounts to that,) that an irresponsible agent, one intrusted with the management of the whole affairs of a corporation, who is perfectly cognizant of their condition, may be authorized by them to purchase goods on credit and to execute notes in their name for the amount of the purchase money, and yet if he makes false representations in regard to the condition of the company, who receives the goods thus fraudulently obtained, it may turn around, in an action brought by the vendors to reclaim

them, and say, "you trusted to the word of our agent. He had no authority to say we were solvent, or to speak of our credit, so as to bind us. He was acting entirely without the scope of his authority, and you must look to him for your remedy." And this too by an association of men forming a *partnership* for particular purposes, and the agent whose acts are thus sought to be repudiated, one of the partners, having more knowledge of the affairs of the company than all the other associates. Neither the cases cited, nor the elementary writers quoted, sanction any such doctrine. A principal is liable for the fraud or misconduct of his agent; and he not only cannot take any benefit from a misrepresentation fraudulently made, but is bound to make the party compensation for the injury sustained. And this, although he may be *innocent;* provided the agent acted within the scope of his authority. There need not be express authority to make a particular representation, but the authority may be implied, as incident to a general authority. (1 *Parsons on Cont.* 62, *and notes. Angell & Ames on Corp.* 291, 301, 302. *Story on Agency*, §§ 45, 46 *and cases cited.* 3 *Seld.* 364, 365. 11 *Wend.* 518.) The authority to Mears to purchase was authority to make the necessary representations as to the credit and solvency of the defendants; just as much so as it was to receive the goods and accept the delivery for the company. Such authority was necessarily incident to the power to purchase on credit. The declarations were part of the *res gestæ*, and were equally obligatory upon the principal as if made by himself. In no other way could there be any safety to third persons in dealing with an agent. The defendants, or those composing the company, knew perfectly well that one of the first facts necessary for them to establish to the satisfaction of a vendor, to obtain a credit, would be their ability to pay. That probably the very first question (as indeed it was) would be, what are your pecuniary circumstances? "*How are you getting along?*" Mears, acting under his authority as treasurer and agent, and with a full knowledge, as the jury found, answered these question in a manner to satisfy the plaintiffs of the ability of the company to pay, and succeeded in effecting

his purchase. And even if the other defendants did not know, at the time, that his representations were false, they are liable upon the principle that of two innocent parties, the one shall suffer who, by his *agent* causes the injury, and will in all such cases receive the least harm. As in this case, the plaintiffs parted with their goods upon the false representations of the defendants' agent, they were delivered to the defendants without consideration. And the plaintiffs by their action have reclaimed them, that is have received them back from the company who have paid nothing for them, and seek to hold them, upon the naked assertion that they are not bound by the declarations of the fraudulent agent—one who is a *partner* with them, and is to participate in the profits of his own fraud. This, clearly, cannot be the law, within any of the cases. The company held Mears out to the world as their principal agent, authorized and empowered to transact their business generally; and whether the principal is defrauded by his representations, or not, is a matter of no consequence, in the application of the principle as to liability to third persons. (*Story on Agency*, § 452.) The agent was apparently, and I might say necessarily, authorized to make the representations which he did, else the purchase could not have been effected. They were according to the usual course of business in purchasing goods on credit. Mears had so purchased before, and had no doubt made like representations. The defendants composing the company all well knew that the goods could not have been obtained, without them. They sent him to purchase, as a man on whose word reliance could be placed. And they as a corporation are liable for his acts and frauds while acting apparently within the limits of his authority, in the same manner as individuals. (*See opinions* in the case of *The Mechanics' Bank* v. *The New York and New Haven Rail Road Co.*, recently decided by the superior court of New York.)

I think the defendants are also liable on another ground. Mears was not only the treasurer and agent of the company, but he was a member of it, a partner in a joint stock association; and his knowledge and his acts were the knowledge and

acts of the partners, within the principle laid down in *Jeffrey* v *Bigelow*, (13 *Wend.* 518.)

It is said that a fair construction of the declarations of Mears would not authorize the plaintiffs to maintain this action. Those representations were undoubtedly made with an object, and that object was to induce the plaintiffs to believe the company were solvent and able to pay. The jury have so found, as a question of fact, and that and all other questions were properly and fairly submitted to them, as no exception seems to have been taken to the charge.

It is further said that there was no proof that the company knew, at the time, that the representations of Mears were false. It has been shown that this was not necessary. But I am not prepared to say there was no proof on that subject. The jury have passed upon it, and found in favor of the plaintiffs on that as well as the other facts of the case. The defendants' counsel must have overlooked the admission that the company was insolvent for many thousands of dollars, as well as the testimony of Mears and the other evidence in the case, when he gravely put forth as a 4th ground of nonsuit, that there was a total absence of proof that the defendants were insolvent at the time the representations were made. The evidence was abundant and overwhelming on that subject, and the jury have found, and well found, in my judgment, that Mears well knew the fact, when he made the purchase.

I can see no good reason, after a careful examination of all the facts in this case, for disturbing the verdict; and judgment must be rendered for the plaintiffs.

[St. Lawrence General Term, September 3, 1855. *C. L. Allen, Hackett* and *James*, Justices.]

## STONE *vs.* SPRAGUE.

20 509
25 252
34 352
47 169
1h 553
41h 579
56h 484
24a 389

A executory contract, for the sale and purchase of land, was made between the plaintiff and defendant, by which the latter was to have the occupation and possession of the premises, so long as he should fulfill and comply with the stipulations of the contract. But if he should make default, then the agreement should be void, and the plaintiff was to be at liberty to immediately enter into the possession and occupancy of the premises, and was to be forever discharged from the agreement. *Held* that upon a breach of the contract by the defendant, the plaintiff had a right to enter, without notice, or demand of possession.

The agreement also provided that on the payment of $745, in five years, with annual interest, the defendant should be entitled to a deed. On the day before the time for payment expired, the defendant tendered the plaintiff the amount, in specie, and requested a deed. The plaintiff replied that he would not receive any thing, nor give a deed; placing his refusal upon the ground that he had not enjoyed such privileges, in the house, as he ought to have had, and saying that he and the defendant must settle, and he would not give any deed till they did. The parties then agreed to leave the question as to damages, to M. and W., and the plaintiff agreed to see W. and ascertain when he could attend to the matter. An indorsement was then made upon the contract, signed by the plaintiff but not under seal, extending the time of payment to the 25th of April. On or about that day the money was again offered to the plaintiff and a deed requested. He again refused to receive the money, or to convey; saying he had not been able to get W. to attend to it: another indorsement was then made on the contract, extending the time of payment to the 15th of May. A few days before the 15th of May the defendant again tendered the money to the plaintiff, if he would execute a deed; which was refused. *Held* that the defendant had substantially complied with the terms of the agreement, so as to be entitled to a deed for the premises; and that, the defendant having been prevented from performing the contract, at the day, by the act of the plaintiff, the latter could not be allowed to take advantage of his own wrong, by insisting that the time for performing the agreement by the defendant had expired.

*Held also*, that proof that at the time of the last tender, and at other times, the plaintiff agreed by parol, with the defendant, not to take advantage of the expiration of the contract, saying that the lapse of a few days would not make any difference with him; and that the money, together with a deed, ready to be executed by the plaintiff, were tendered, on the 18th of May, three days after the expiration of the time, as last extended, was proper evidence, and ought to have been received.

The *time* for performing a written contract under seal, may be enlarged by parol.

A strictly legal tender may be waived, by an absolute refusal to receive the money, or do the act required. This is upon the principle that no man is bound to perform a nugatory act.

Where there is a mutual obligation on a purchaser to pay the purchase money

and on the vendor to convey the property purchased, an offer and readiness to perform on the part of the purchaser, is sufficient, without tendering a deed ready to be executed by the vendor; especially where the vendor refuses to convey at all.

THIS was an action of ejectment, brought to recover a lot of land at Port Henry, in the county of Essex. The action was tried at the circuit in that county in July, 1854. The plaintiff's counsel introduced in evidence the counterpart of the agreement, a copy of which it was admitted was contained in the answer. That agreement was dated the 9th day of April, 1848, and was executed by the parties. The plaintiff agreed to sell, and the defendant to purchase, the lot in question, and upon which it was recited therein the defendant had erected a brick dwelling house, for the sum of $742,47, to be paid in five years from the date, with annual interest. The defendant was to be at liberty to possess and occupy the premises so long as he complied with "all the stipulations and agreements to be performed on his part, and no longer." The plaintiff agreed to execute and deliver to the defendant a warranty deed of the premises, on payment of the principal and interest, in the manner and at the times mentioned in the agreement; but in case of default in the payment of the principal and interest, at the time or times when they became due, or of failure in the performance by the defendant of any of the conditions of the agreement, it was to become null and void, and the plaintiff was to be at liberty to immediately enter into the possession and occupancy of the premises and to be forever discharged from the agreement. The plaintiff was to have the right to occupy the brick part of the house on the lot, as he then occupied it; and so long as he so occupied it, he was to allow the defendant the interest of the principal sum to be paid for the premises, as rent. There were other stipulations contained in the agreement, which was under seal, but it is not necessary to recite them here. The plaintiff proved that he had occupied the brick part of the house on the premises described in the agreement, before and since the date of the contract, up to the time of trial, and that the defendant had been in possession of

the remaining part of the said premises, and that the value or yearly use of said part, was worth $50 a year.

The plaintiff having here rested, the defendant's counsel moved for a nonsuit on the following grounds: 1. That the plaintiff had failed to prove a cause of action. 2. That the plaintiff should have shown a demand of the possession of the premises, previous to the commencement of this action. 3. That the defendant was entitled to notice to quit. The motion was overruled by the court, and the defendant's counsel excepted. The defendant then proved the execution by the plaintiff of two several extensions of the agreement, which were indorsed on the counterpart held by the defendant, and which were read in evidence. The first was as follows: "I hereby agree to extend all the conditions of payment, and other matters within contained, to the 25th of April, 1853. Port Henry, April 8, 1853." (Signed by the plaintiff.) The second extension read thus: "I hereby agree to further extend all the conditions of payment and other matters within contained, from the 25th of April, 1853, to the 15th of May, 1853. Port Henry, April 23, 1853." (Signed by the plaintiff.)

Chilion A. Trimble, a witness for the defendant, testified as follows: "Defendant engaged me to raise the money and fulfill the contract with the plaintiff, and was to give me security on the place. I had raised the funds, and went up the day before the original contract expired, and had an interview with the plaintiff, at which the defendant was present. I told the plaintiff I had the specie to pay up the contract, and asked him if he would receive it and give a deed. He said he would not receive any thing, nor give a deed. He seemed to complain that he had not had such privileges as he ought to have, in the house. He said they must settle, and he would not give a deed till they did. I suggested to them that they had better settle or leave it out to men. They agreed to leave the question as to damages to Samuel Murdock and James S. Whallon. The plaintiff said he would see Whallon, and see at what time they could attend to it. I asked the plaintiff if he should insist on the specie, and he said he would not." The witness fur-

ther testified that he went and saw the plaintiff, at the time the first extension ran out; that he had the money, and again offered to pay it to the plaintiff, but he refused to receive it. He said he could not get Whallon to attend to settle the question. The witness told him he had the money ready for him and he could have it at any time when he would give a deed. He refused to take the money, and made the second extension. A few days before the time expired of the last extension, the witness again offered to pay the plaintiff the money, but he again refused to receive it. The defendant's counsel here offered to show that the plaintiff, in view of the delay in obtaining Whallon to attend to the settlement of the damages, agreed with the defendant, by parol, not to take advantage of the expiration of the contract, and said that the lapse of a few days would make no difference; that all he wanted was his money. This offer was objected to, and rejected by the court, on the ground that the agreement was by parol, and the defendant's counsel excepted. The defendant's counsel then offered to show that on the 18th day of May, 1853, the defendant tendered to the plaintiff $745 in money, and a blank deed covering the premises, and demanded its execution, and that the plaintiff refused to receive the money and execute the deed. This offer was objected to, by the plaintiff's counsel, and rejected by the court, and the defendant's counsel excepted. The defendant's counsel then produced in court $745 in specie, being the money before offered to the plaintiff, and offered to deposit the same, subject to the direction of the court; which offer was objected to, and overruled by the court, and the defendant's counsel excepted.

The court then charged the jury that the plaintiff was entitled to recover, and that the evidence given by the defendant did not entitle him to any relief whatever; and directed the jury to find a verdict for the plaintiff for the possession of the premises, and damages at the rate of $50 a year, for the use of the premises. The defendant excepted, and the jury found a verdict according to the direction of the court. The case now

came up on a bill of exceptions. and a motion was made for a new trial.

*A. R. Waldo* and *O. Kellogg*, for the plaintiff.

*J. P. Butler* and *H. H. Ross*, for the defendant.

*By the Court*, C. L. ALLEN, P. J. I do not think the defendant was entitled to notice to quit. The case of *Doolittle* v. *Eddy*, (7 *Barb.* 74,) decided in this district, establishes the proposition, if it was not settled by previous cases, that an executory contract for the sale and purchase of land, giving to the purchaser a right to enter and possess the premises until default in the payment of the purchase money, without any reservation of rent, or fixed time, is, as respects the possession, a license and not a lease, and the relation of landlord and tenant does not exist. The defendant here was to have the occupation and possession of the premises as long as he should fulfill and comply with the stipulations of the contract. But if he should make default then the agreement should be void, and the plaintiff was to be at liberty "to *immediately* enter into the possession and occupancy of the premises and was to be forever discharged from the agreement." The case does not differ, in this particular, from the one cited; and if the contract was broken on the part of the defendant, the plaintiff had a right to enter without notice, or demand of possession.

The material and important question in this case is, whether the defendant had not substantially complied with the terms of the agreement, so as to be entitled to a deed for the premises. The agreement provided that on the payment of $745 in five years, with annual interest, the defendant should be entitled to a deed; and if the plaintiff continued to occupy the brick part of the dwelling house, such occupation was to be considered as equivalent to the interest, by way of rent. There is no dispute as to the fact of occupation. It was proved, and indeed seemed to be conceded, on the trial, that the plaintiff had occupied this part of the dwelling house, from the time of executing the

agreement to the commencement of this action. Consequently the interest was paid, and it was only necessary for the defendant to pay the principal sum, at the time appointed in the contract, to entitle him to a deed of the premises in question. The testimony is that on the day before the time for payment expired, an interview was had with the plaintiff, during which the amount was tendered, in specie, and a deed requested. He replied that he would not receive any thing, nor give a deed. Here then was an absolute tender of the money, a refusal to receive, and to execute a conveyance. It is true no deed was offered by the defendant, at that time, ready for execution. But that was not necessary, and if it had been, the general rule that a strictly legal tender may be waived, by an absolute refusal to receive the money or do the act required, clearly applies, on the principle that no man is bound to perform a nugatory act. Where there is a mutual obligation on a purchaser to pay the purchase money, and on the vendor to convey the property purchased, an offer and readiness to perform on the part of the purchaser, is sufficient, especially where the *vendor refuses to convey at all.* (*Bellinger* v. *Kitts*, 6 *Barb.* 273.) It appears to me that upon this part of the case alone, sufficient is shown to defeat the plaintiff's right of recovery.

But the plaintiff insists that his refusal to convey at that time, was based upon the fact that he had not enjoyed such privileges in the house as he ought to have done. He said they must settle, and he would not give a deed till they did. There was no proof, nor was any complaint of that kind urged or pretended on the trial. The parties, however, agreed to leave the question as to damages to Samuel Murdock and James S. Whallon, and the plaintiff was to see Whallon, and ascertain when he could attend to the matter. The first indorsement was then made upon the contract, and signed by the plaintiff, but not under seal, agreeing to extend the time of payment from the 9th to the 25th of April, 1853. This was done, undoubtedly, to enable the arbitrators to determine in the meantime, as to what amount of damages, if any, the plaintiff was entitled to. On the 25th of April, or about that time, the money was again offer-

ed to the plaintiff and a deed requested. He refused to receive the money or to convey. He said he had not been able to get Whallon to attend to it, and then indorsed another extension of the time of payment to the 15th of May following, which would be Sunday. A few days before the 15th, the plaintiff was again offered his money, if he would execute a deed, which he refused. The defendant offered to show that at this time, and at others, the plaintiff, in view of the delay in procuring Whallon to attend to the settlement of the damages, agreed by parol, with the defendant, not to take advantage of the expiration of the contract; and that he stated to the defendant that the lapse of a few days would not make any difference with him. And the defendant proposed to follow up that proof by showing a tender of the money, and of a deed ready to be executed by the plaintiff, on the 18th of May, 1853, three days after the expiration of the time by the last extension. This testimony was objected to by the plaintiff and rejected by the judge, on the ground that the agreement was by parol. And he seems to have regarded the extension of time as entirely void, because *not under seal*, as he charged the jury that the evidence on the part of the defendant was wholly insufficient to constitute a defense, and that the plaintiff was entitled to recover.

I think the learned justice erred. It has repeatedly been decided that the *time* of performing a written contract under seal may be enlarged by parol. In the case of *The Mayor &c. of New York* v. *Butler*, (1 *Barb. S. C. Rep.* 325, 337,) the court remarked that such an extension is in effect a *waiver* of a strict performance of the conditions of the contract; that no party can insist upon a condition precedent, when its non-performance has been caused by himself; that there may be an effectual waiver by parol of a condition specified in a written or even a sealed contract. "It is a sound principle," says Ch. J. Thompson in *Fleming* v. *Gilbert*, (3 *John.* 528,) "that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned." The case of *Wiswall* v. *McGown*, (2 *Barb. S. C. Rep.* 270,) relied upon by the plaintiff's counsel, does not militate against this doctrine. The court say,

in that case, that courts of equity will interfere in favor of parties who were not ready to perform their agreement at the day, where a party has failed, through some unforeseen accident, *or where there is something indicating a waiver of the objection*, by the other party. But the case of *Esmond* v. *Van Benschoten*, (12 *Barb.* 366,) adjudicated in this district, settles this question beyond dispute, and decides that "*it is competent for parties on the expiration of a sealed contract*, to enlarge the time for performance by parol."

The extension of the time here was occasioned by the plaintiff. The defendant was ready, at the day appointed, to pay the money and receive his deed. The plaintiff refused, and indorsed an extension of the time of payment on the contract, to enable him in the meantime to procure the services of Mr. Whallon, in assisting Mr. Murdock to ascertain the amount of damages to which he was entitled. He failed on his part to procure such attendance. He suffered the time again and again to elapse for the fulfillment of the contract, and finally attempted to shield himself under the technicality that the time for performance of the contract had expired; that the agreement to extend it was not under seal, and was without consideration and void; and that the tender afterwards made, which he admits was sufficient as to amount, was too late. In my judgment, to allow these allegations to avail, would be to permit the plaintiff to take a most unjust advantage of his own wrong, and contrary to all the cases bearing upon the question. The plaintiff was not entitled to recover, and should at least have been nonsuited, if the defendant was not indeed entitled to the affirmative relief which he demands in his answer.

It is objected that the answer is not sufficient for that purpose. If this were so, I should be inclined to permit the defendant to amend, as I consider his claim for relief clear and well founded. In actions of a legal character it now seems to be well settled that any defense, whether legal or equitable, may be interposed. That the same facts which would formerly have entitled a defendant to be relieved in equity may be set up in his answer as a full defense. (*Dobson* v. *Pearce*, 1 *Duer*, 142. 8 *How.* 416.

1 *Whitt.* 507 *and cases cited. Haire* v. *Baker*, 1 *Selden's Rep.* 357.)

This court said, in *Dewey* v. *Hoag*, decided at May term, 1854, on appeal from the decision of Justice Hand, (15 *Barb.* 365, 369,) that in order to avail himself of an equitable defense, "the defendant must become an actor in respect to his claim, and his answer must contain all the elements of a bill for a specific performance, and he must ask and obtain affirmative relief. The judgment must be for the plaintiff that he recover the land, or for the defendant that the plaintiff convey to him on such terms as the court shall adjudge." In that case the defendant claimed *no affirmative relief*, and leave was given to him to amend. The court, however thought that the cause of action did not arise out of the contract or transaction set forth in the complaint. Here the defense wholly arises out of the contract under which the defendant went into possession of the premises, and for a breach of which the plaintiff now seeks to recover possession. The defendant therefore brings himself within the 1st subdivision of sec. 150 of the code, and is entitled to avail himself of the defense which he sets up. The case of *Foot* v. *Hadaway*, relied upon by the plaintiff, does not impugn the decision in *Dewey* v. *Hoag*, but coincides with and affirms it.

I do not say that the answer is insufficient. I am rather inclined to think that it is not. Be that as it may, I am of opinion that a new trial should be granted, with costs to abide the event. The defendant should have leave to amend his answer, if he deems it necessary. And unless the proof should materially differ from that produced on the former trial, the plaintiff should be adjudged to convey to the defendant the premises in question, on payment of the sum mentioned in the contract.

Judgment accordingly.

[St. Lawrence General Term, September 3, 1855. *C. L. Allen*, *Bockes* and *James*, Justices.]

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## THE PEOPLE, *ex rel.* Marshall, *vs.* THE RAVENSWOOD, HALLETT'S COVE AND WILLIAMSBURGH TURNPIKE AND BRIDGE COMPANY.

A plaintiff admits the corporate existence of a corporation, by suing it by its corporate name. And this admission will not be overcome by his alleging, in the complaint, facts which, if true, would go to show that the defendant had failed to comply with such terms as by the charter were conditions precedent to its organization as a corporate body.

In such a case the latter allegations in the complaint may be disregarded, as being irrelevant and impertinent; inasmuch as a plaintiff cannot be permitted to treat the defendant as a corporation in fact, for the purpose of suing it, and then insist that it never performed those acts, without performing which it could not have acquired existence.

Where the complaint, in an action against a corporation, alleged that the defendant had violated its charter, and also that it had omitted to do certain things claimed to be essential to give it a legal, corporate existence, and prayed that the defendant might be excluded from the franchises claimed by it, and that the corporation might be dissolved; *Held*, on general demurrer to the whole complaint, that the complaint, as *a whole*, was good; it containing but one subject matter, viz: the right of the defendant to continue to exercise certain franchises. CLERKE, J. dissented.

APPEAL from a judgment entered at a special term, overruling a demurrer to the complaint, with costs. The complaint alleged that the defendants, who claim to be a corporation, created by and under the act of the legislature of this state, entitled "An act to incorporate the Ravenswood, Hallett's Cove and Williamsburgh Turnpike and Bridge Company," passed April 18th, 1838, and an act, entitled, "An act to amend the charter of the Ravenswood, Hallett's Cove and Williamsburgh Turnpike and Bridge Company," passed April 21st, 1840, had, in the county of Kings, for the space of six years, now last past, and upwards, used and still did use, without any legal authority, the following privileges and franchises, to wit: that of being a body politic and corporate in law, fact and name, by the name of the Ravenswood, Hallett's Cove and Williamsburgh Turnpike and Bridge Company, and by the same name, to plead and be impleaded, answer and be answered unto, and also the following privileges and franchises, to wit: that of demanding and receiving from all persons passing over the bridge

erected by the defendants over Newton creek, or over the bridge erected by them over Bushwick creek, certain specified tolls; (including several instanecs in which no tolls were legally chargeable, the persons of whom they claimed the right to receive the same, being *exempt* by law.) All which said liberties, privileges and franchises, the defendants, during all the time aforesaid had usurped, and still did usurp, as the plaintiffs were informed and believed. And the plaintiffs for a more particular statement and specification, further showed upon information and belief, "that the capital stock of the defendants never has been nor is it now twenty thousand dollars, nor did any persons ever become stockholders, pursuant to the said acts, or either of them. And also, that the Ravenswood, Hallett's Cove and Williamsburgh turnpike road never was, and is not now laid out by defendants, not less than four rods wide, and that twenty-two feet of such width, never was, nor is it now bedded with stone, gravel, sound wood or other hard substance, well compacted, and of sufficient depth to secure a good and solid foundation, by the defendants, and also said road never was, and is not now faced with gravel, or broken stone, of a depth not less than nine inches, in such manner as to secure a firm and even surface, rising in the middle by a gradual arch, by the defendants, and also that the ditches on each side of said road, when practicable, never were, nor are they now so made as to render easy the passing of a sleigh thereon, by the defendants, and that they never were, nor are they now so formed by the defendants as to permit carriages conveniently to pass on and off the said turnpike, where it was or is intersected by other roads, and also, that the said turnpike road never was and is not now made by the defendants of such width as was and is practicable, not less than twenty-two feet in any one place, and also that the lower side where it was and is not of full width never was, and is not now furnished with a strong and sufficient fender or railing, of the height of at least four feet above the surface of the said road, along which said fender ought to have been and to be constructed, and also, that no milestone or post ever was, or now is erected or maintained by the defendants on each mile of the

road, on which was or is fairly or legibly marked or inscribed the distance of such stone or post from the place of the commencement of the road; also, that the defendants have never kept the whole of said road in turnpike order and repair; and also, that they have never constructed, completed and kept in constant repair said road, with all the necessary buildings and appurtenances; and also, that the defendants never have reported to the comptroller, an account of the expenses of the alleged construction of said road; and also, that the defendants have not exhibited, annually, to the comptroller, an account of the sums of money arising from tolls, of the disbursements, and of the dividends actually made within the year; and also, that defendants never gave notice to the governor that said road, or any ten miles thereof, was completed so that he might appoint three discreet freeholders, to view the road, and report to him in writing, whether said road was completed in a workmanlike manner, according to the requisitions of the title above specified, and of said alleged act of incorporation; and also, that no governor of this state, has ever, by license under his hand, and the privy seal of the state, permitted the defendants to erect any gates and turnpike on said road for the collection of any tolls; and also, that the defendants did not, within two years from their incorporation, commence the construction of the said road, described in the act of incorporation; and also, that the defendants did not, within five years from such incorporation, complete the said road, according to the provisions of title 1, chapter 18, and part 1 of the revised statutes, and of their act of incorporation. And also, that the defendants now are and for more than five years last past have been insolvent, and also for such time have neglected to redeem or fully pay their notes, claims, demands, judgments and other evidences of debt. And also, that the association intending to apply and who did apply to the legislature, for the act of incorporation of the defendants, and that the defendants in their application for the act, altering, amending and extending their charter, passed April 21st, 1840, did not cause notice of such application to be published, as required by the statute in such cases." And the

plaintiff insisted that no tolls should or could be legally collected at any gate of the defendants on the said road in either of four cases specified ; in which cases the complaint alleged the defendants claimed a right to receive the same.

Wherefore, the plaintiffs demanded that by the judgment of the court the defendants be excluded from the franchises and privileges aforesaid, and from all corporate rights, and that the said corporation be dissolved and their charter vacated, and that the plaintiffs recover against the defendants the costs of this action.

The defendants demurred to the complaint, and assigned the following causes of demurrer : 1. That several causes of action had been improperly united ; 2. That the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was overruled with costs ; and judgment ordered to be entered for the plaintiffs, pursuant to the prayer of the complaint, unless the defendants paid the costs, within ten days, and answered the complaint.

*Ogden Hoffman*, attorney general, for the plaintiffs.

*C. N. Potter*, for the defendants.

Mitchell, J. The complaint shows that the defendants have violated their charter, and also that they omitted to do certain things which might be essential to give them a legal corporate existence, and prays that they may be excluded from the franchises which they claim, and that the corporation be dissolved. The defendants object that several causes of action are improperly joined ; insisting that one cause treats the corporation as never having existed, and the other as having once existed and then lost its right to a continued existence ; and that these are inconsistent allegations, and the judgments to be rendered on them, incompatible. This mode of pleading is deliberately sanctioned in *The People* v. *The Saratoga and Rensselaer Rail Road Company*, (15 *Wend.* 126.) If the former system did not allow it, the present does, as it allows

causes of action arising out of the same transaction or the same subject matter. There is but one subject matter in this case—the right of the defendants to continue to exercise certain franchises. That right may be decided against them, by showing that they did not comply with conditions precedent to the origin of that right, or with conditions subsequent; and in either case the judgment is that they be excluded from such franchises. (*Code*, §§ 440, 443, *&c.*) In like manner if a lease were executed to one, with a condition that the lessee should not enter until he should pay a certain bonus, and to be void on non-payment of rent, the lessor—if the lessee entered—might show that neither the bonus nor the rent was paid, and claim the possession of the land. There would be but one subject matter—the right to the possession of the land.

The code recognizes that the action may be against the *corporation* for either kind of usurpation of franchises, when it provides (§ 441) that the judgment, whether against a natural person *or association*, if they are found guilty of usurping a franchise, shall be that they be excluded from such franchise.

The judgment of the special term, against the defendants, should be affirmed with costs.

Cowles, J. Scire facias, quo warranto, and information in the nature of quo warranto, are abolished, and the remedies provided in part 2, title 13, chap. 2 of the code, substituted in their place. This suit, and the pleadings under it, must be construed by those provisions. It is brought against the defendants as a corporation. The defendant is sued by and in its corporate name. The object is to *vacate its charter*, as provided for in § 430 of the code. It is brought against the *corporation*, not against natural persons usurping, or assuming without proper authority to exercise corporate powers or rights. By the act of bringing the suit the plaintiffs assume that the defendants have acquired legal corporate existence; for if it did not exist as a corporation, they could not be brought into court as such.

The distinction between actions brought to *vacate a charter* or to *annul the existence of a corporation*, and those brought

against individuals *acting as a corporation without being duly incorporated*, is clear and broad. (*Code*, §§ 430, 432.) The one lies against the *corporate body itself*, the other against the *persons* unlawfully assuming to act as a corporation. The one can only be brought on leave first obtained from the supreme court or a judge thereof. (§§ 430, 431.) The other may be brought without such leave. (§ 432.) The judgment in the one case is that the "corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved." (§ 442.) In the other case the judgment is that the person usurping such franchise be excluded therefrom; and he may also be fined, in the discretion of the court. (§ 441.) In case of judgment against the corporation, a copy of the judgment is to be filed in the office of the secretary of state. (§ 445.)

This distinction under the code had been previously recognized. Formerly judgment of *ouster* was rendered when a liberty or franchise was wrongfully usurped, and that supposed there had been no grant; but if the liberty or franchise had been granted, or had once existed and was forfeited for abuse or misuser, judgment of *seizure* was given. Judgment of *ouster* would operate upon *individuals;* judgment of *seizure* upon a *corporation.* (*The King* v. *The City of London*, cited in 2 *Term Rep.* 523, and commented upon in *The People* v. *The Saratoga and Rensselaer Rail Road Co.*, 15 *Wend.* 113.) In the last case the court say, "When therefore an information is filed under the revised statutes against a corporation by its corporate name, the existence of the corporation is admitted—or rather that it once had a legal existence." And under the provisions of the code the same principle is evidently applicable.

This suit being against the corporation by its corporate name, must be held to admit that the defendant has once acquired legal and actual corporate existence, and that admission arising from the fact of the suit being brought against the defendant as a corporate body treating it and assuming it to be a legal entity, cannot, as it seems to me, be overcome by any averments in the complaint that it had not acquired existence. Otherwise, we are presented with the absurdity of assuming to bring into court a

fictitious party, which neither has nor ever had existence; and that too in face of the fact, as shown by the record, that the defendant sued is actually present in court, which is the case here; for the defendant is not only sued by this corporate name as an artificial person actually in existence, but appears in court by that name, and interposes this demurrer. There is, therefore, such a legal entity as this defendant. It is admitted by the plaintiff by the very act of suing, and is conceded by the defendant by the act of appearing and demurring; and this broad fact cannot be overcome by the plaintiff's charging in his complaint facts which, if true, would go to show that the defendant had failed to comply with such terms as by the charter were conditions precedent to its organization as a corporate body.

The plaintiff has inserted in his complaint averments of that description, and which are only proper to be made when the suit is against *individuals*, for usurping or assuming to act as a body corporate when in fact they are unincorporated.

These averments are, as I regard them, manifestly irrelevant and impertinent; for the plaintiff cannot be permitted to treat the defendant as a corporation in fact for the purpose of proving it, and then assume to charge that it never performed those acts, without performing which it never could have acquired existence.

But the complaint also charges other acts of neglect or omissions of duty which, if true, would forfeit the charter, and also avers the doing of acts which could only be performed by the defendant as an actual existing corporation; thus in effect averring its actual existence.

As I regard the case, the plaintiffs admit the corporate existence of the defendant by the mere fact of suing it by its corporate name, and consequently must be held to have admitted the performance by it of all such acts as by the charter were conditions precedent to its entering upon a state of legal existence. All averments to the contrary must, as I think, be regarded as irrelevant, and on motion be struck from the complaint or disregarded on the trial. Such facts only can be proved at nisi prius in this case as go to show that by misuser, neglect or abuse, the defendants have forfeited their charter.

Had all of the allegations which go to show that the defendants had never commenced a legal corporate existence been embraced in one count or statement of a cause of action, unaccompanied by any other averments, and the demurrer had been interposed to that one count or statement of the cause of action, I should have no hesitation whatever in holding the demurrer well taken, since such averments alone would show no cause of action against the defendant. But the complaint, while it states facts which are entirely irrelevant as I view the case, also avers other facts which are pertinent and proper, and which if true show that the defendant has forfeited its charter. The demurrer is to the *whole complaint*, and the complaint, *as a whole*, is good, while it contains much which is irrelevant and ought to be stricken from the record. But that remedy is by motion, not by demurrer.

For these reasons I concur with my brother MITCHELL, that the judgment of the special term should be affirmed. But with leave to the defendants, should they appeal to the court of appeals, to withdraw their demurrer, and answer after the cause is remitted to this court, on payment of costs.

CLERKE, J. The complaint alleges first, in substance, that the defendants have acted as a corporation, *without being legally incorporated;* and, secondly, sets forth several acts and omissions, in consequence of which they have forfeited their corporate rights, privileges and franchises. The complaint demands judgment, first, that the defendants be *excluded* from those franchises and privileges and all corporate rights; and secondly, that the corporation be dissolved and their charter vacated.

These are inconsistent causes of action; because they require different modes of proceeding, and the nature of the judgment appropriate to each is different. The language employed in *The King* v. *Amery*, (2 *T. R.* 515,) and in *The People* v. *Saratoga and Rensselaer Rail Road Co.*, (15 *Wend.* 113,) is precisely applicable to this case. If the object of this action was to dispute the fact of the incorporation, it should have been commenced against *individuals;* if to effect the dissolution of a corporation having an actual existence, then it is correctly in-

stituted against the corporation. But the plaintiffs seek both objects, which are not only inconsistent with each other, and which require totally distinct and inconsistent judgments, but in order to accomplish the first object, the individuals unlawfully exercising corporate powers, which, it is alleged, were never conferred on them, should be sued by their respective names. In the one case, judgment of *ouster* would be rendered; equivalent to the demand in this complaint that "the defendants be excluded," &c.; and in the second case, the proper judgment would be that of *seizure*, equivalent to the other part of the demand in this complaint, "that the corporation be dissolved," &c. The one is rendered against *individuals* for unlawfully assuming to be a corporation; the other is rendered against a *corporation* for a forfeiture of its corporate privileges.

The two cases referred to by the counsel for the plaintiffs have no applicability to these questions. That of *The People* v. *The Bank of Hudson*, (6 *Cowen*, 217,) was an information against an incorporated company, seeking a *dissolution* on the ground of forfeiture; it was not pretended that it had not been duly incorporated; but, being a corporation, it had forfeited its charter, and therefore the language quoted by the counsel had no relevancy in the connection in which it was employed; and so the court expressly state, that the judgment must be against the corporate name, being a judgment of *seizure*. The other case referred to, (*The People* v. *The Kingston and Middletown Turnpike Road Co.*, 23 *Wend.* 193,) is of the same description; it was commenced for the purpose of effecting the dissolution of a corporation, which it was admitted had had an actual existence; but which, it was alleged, was forfeited by a non-compliance with the requirements of the act of incorporation, in neglecting or refusing to perform the duties enjoined. It was not pretended, as in this case, that the defendants never had a legal existence, that "*without legal authority* they claimed to be a body politic and corporate in law, fact and name."

I am, however, of opinion that the other facts stated in the complaint constitute sufficient ground for the forfeiture of the

corporate privileges to entitle the plaintiffs to a judgment of dissolution; but the first cause of demurrer is well taken.

The judgment of the special term should be reversed, with costs.

Judgment affirmed.

New York General Term, September 3, 1855. *Mitchell*, *Clerke* and *Cowles*, Justices.]

## Roof *vs.* Fountain, executor &c.

A testator, by his will, devised as follows: "I give and bequeath unto my daughter Mary Roof the use or interest of $800, for and during her natural life; and at her decease I give and bequeath unto my granddaughter, M. A., $200 of the said $800." The testator subsequently directed his executors to divide among his children and grandchildren, in proportion to the several legacies bequeathed to them, "the said sum of $600 left at the decease of his daughter Mary, and all the residue and remainder of his estate not otherwise disposed of." After the testator's death, and during the lifetime of Mary Roof, two of the legatees, being married women, with their husbands quitclaimed to R. R., husband of Mary Roof, and to his heirs and assigns forever, "all the right and title which they then had or might thereafter have, to a certain legacy bequeathed to his wife Mary Roof" by the testator. *Held* that the thing released or quitclaimed was only the legacy bequeathed to Mary Roof, which was not the $800 or the $600, but only the *use* or *interest* of $800 for life; the legacy bequeathed to her being only a life estate in the $800, and the legacy given to the other legatees being the reversion in that sum. That such reversion did not pass by the quitclaim; and that consequently the executor was not liable to R. R. for the amount of the shares in the $600 which he had paid over to the assignors or releasors, after the death of Mary Roof. Clerke, J., dissented.

APPEAL by the defendant, from a judgment entered upon the report of a referee. The action was brought against the defendant, as executor of Ezra Fountain deceased, to recover the share or interest to which Alfred Wood and Electa his wife, and John Woolsey and Elizabeth his wife, were entitled after the death of one Mary Roof, wife of the plaintiff, under and by virtue of the will of Ezra Fountain deceased, in the sum of $600,

part of the sum of $800 of which said Mary Roof had the use for her life by the terms of said will; it being alleged that the said Woods and Woolseys had transferred their right thereto to the plaintiff, Rice Roof, who had given notice of such transfer to the defendant, the executor of Ezra Fountain, before he had paid over the same according to the terms of the will.

On the trial, before the referee, the plaintiff offered and read in evidence the following instrument, the execution and delivery of which were admitted: "Know all men by these presents, that we, Alfred Wood and Electa his wife, of the town of Bedford, county of Westchester, and state of New York, have *quitclaimed*, and by these presents do quitclaim unto Rice Roof, of the city of New York, and to his heirs and assigns forever, all our right and title which we now have or may hereafter have to a certain legacy bequeathed to his wife Mary Roof, by our father and father-in-law, Ezra Fountain. In witness," &c. A similar instrument, executed by John Woolsey and his wife, was also read in evidence. The plaintiff's counsel then produced and read in evidence the last will and testament of the testator, Ezra Fountain, the contents of which are sufficiently set forth in the opinions which follow. The referee reported, as matters of law, that Mrs. Wood and Mrs. Woolsey intended to convey, and did convey, by the instruments so executed by them, their respective shares of the said $800 to the plaintiff, and that the latter was entitled to judgment for the sum of $353.62, and costs

*A. L. McDonald*, for the plaintiff.

*Ferris & Frost*, for the defendant.

Cowles, J. By the will set forth in the proof it appears that the testator, Ezra Fountain, bequeathed unto his daughter "Mary Roof the use or interest of $800 for and during her natural life;" and by the same will $200 of the $800, upon the decease of the said Mary Roof, was given to the testator's granddaughter, Matilda Adams. The will then provides that the sum of $600 left at the decease of Mary Roof (being that same

sum of $800 above mentioned less the $200 given to Matilda Adams) and all the residue and remainder of his estate not otherwise disposed of, he divided among his children and grandchildren, in proportion to the several legacies bequeathed to each of them by his will.

During the lifetime of Mary Roof and after the testator's death, the plaintiff, who was the husband of Mary Roof, took from Alfred Wood and Electa his wife and from John Woolsey and Elizabeth his wife, two several instruments by which they did "quitclaim unto Rice Roof of the city of New York, and to his heirs and assigns forever, all our [the assignors'] right and title which we now have or may hereafter have to a *certain legacy* bequeathed to his [plaintiff's] wife Mary Roof, by our father and father-in-law, Ezra Fountain."

The only *legacy* which Mary Roof took under the will was the "use or interest" for life of the $800. The above named Electa Wood and Elizabeth Woolsey who joined in the instruments above alluded to, to the plaintiff, it is admitted, were two of the parties who were by the terms of the will to share in the distribution of the "residue and remainder" of the testator's estate, including the above sum of $600. The plaintiff claims that by the two conveyances or quitclaims to him he took the shares in the $600 which upon the death of Mary Roof, Electa Wood and Elizabeth Woolsey were to receive. And he now claims to recover from the defendant, who, as executor of Ezra Fountain, has paid over those shares to Mrs. Wood and Mrs. Woolsey. The difficulty in the case is, that the plaintiff only bought from Mrs. Wood and Mrs. Woolsey and their respective husbands the "legacy bequeathed to his (plaintiff's) wife, Mary Roof" by the will of Ezra Fountain; and all that Mary Roof took under that will, was the "use or interest" for life of the $800. Neither the $800, nor any portion of that principal sum, was a *legacy* to Mary Roof, and could not therefore have been sold by Mrs. Wood and Mrs. Woolsey to the plaintiff. Even if the parties in fact intended to convey the contingent interest which they had in the $600, after Mary Roof's death, they have failed to so express it in the release or

"quitclaim" to the plaintiff. The case stands on the mere *legal effect* of the *quitclaim ;* for even had it been allowable to explain by parol, or *dehors* those quitclaims, that the word *legacy* as therein used, was intended to have a broader or more extended construction than is implied by the quitclaims on their face, yet no such proof was offered or given. We have, therefore, only to ascertain the fair legal construction to be given to the instruments under which the plaintiff claims; and upon that question there can be no doubt. The plaintiff took just such interest as his grantors had in the legacy left by the will to Mary Roof. What Mary Roof took under the will was the use or interest of $800 during her natural life—and whatever interest the plaintiff's grantors had in that "use or interest" of the $800 for the life of Mary Roof, was by these quitclaims conveyed to the plaintiff, and nothing more. He consequently had no interest in the $800, or any part of it, after the death of Mary Roof, and the defendant cannot be made responsible for having distributed the $600 as provided for in the will. The referee's report must be set aside and a new trial granted, costs to abide the event.

Mitchell, P. J. The will is in this form: "I give and bequeath unto my daughter, Mary Roof, the use or interest of $800, for and during her natural life; and at her decease I give and bequeath unto my granddaughter, Matilda Adams, $200 of the said $800." Afterwards the testator directs his executors to divide among his children and grandchildren, in proportion to the several legacies bequeathed to them, "the said sum of $600 left at the decease of his daughter Mary, and all the residue and remainder of his estate not otherwise disposed of."

Two of the legatees, being married women, with their husbands quitclaimed to Rice Roof, husband of Mary Roof, and to his heirs and assigns forever, "all the right and title which they then had or might thereafter have to a certain legacy bequeathed to his wife Mary Roof" by the testator. The plaintiff, Rice Roof, contends that the executor is bound to pay the

principal of the $600 to him. The executor and the assignees contend that the quitclaim merely released to Rice Roof any possible claim they might have to the income of the $800. It is very probable, from some circumstances, that this was the intention. But whatever the intention was, it is expressed in so uncertain a way that it is not remarkable that there should be a contrariety of opinion about it. There is no consideration for the release, expressed in it, and none proved. Could it then operate any further than as a confirmation of what was already bequeathed to the wife of the releasee, but which might possibly be disputed by the releasors? Where an instrument is without consideration, this seems to accord best with the probable intention of the releasor. In such case, too, there is no reason for extending the description of the thing released, beyond its literal meaning, or to give it a liberal interpretation. The thing released is only the legacy bequeathed to Mary Roof. That legacy was not the $800 or the $600, but, in the words of the will, only "the *use or interest* of $800 for and during her natural life." So that when the legacy to her was released, it was a release only of the *use or interest in the* $800. The legacy bequeathed to Mary Roof was only a life estate in the $800, and the legacy bequeathed to the assignors was the reversion in that sum. The first, the assignors professed to release, but not any thing bequeathed to them.

I concur with my brother COWLES that the referee's report must be set aside, and a new trial granted; costs to abide the event.

CLERKE, J. If the assignors intended to release any thing but the proportionate parts of the legacy, to which they would be entitled after the death of Mary Roof, they were performing an idle ceremony. They had nothing else to release: they had no claim to the life interest bequeathed to her, but a future right to a portion of the money of which Mary Roof was to have the use during her life. This was the *legacy* (the *principal*,) referred to in the assignment; and which, according to the fair

interpretation of the language, taken in connection with the condition and circumstances of the parties, they intended to convey. I do not concur.

Report set aside, and new trial granted.

[New York General Term, September 3, 1855. *Mitchell, Clerke* and *Cowles*, Justices.]

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## King & Davidson *vs.* Lowry & Jarvis, impleaded with Brown.

In an action against several persons, as joint owners of a vessel, for supplies furnished for the vessel, proof by the plaintiffs that the supplies were delivered on board the vessel, that they rendered a bill thereof to B. one of the joint owners, that it was last seen in his possession and that it had been inspected by the other joint owners, is sufficient, after proving service of the usual notice on B. to produce the bill, and his failure to do so, to authorize parol evidence to be given of its contents.

Joint owners of a vessel are primarily liable, at all events for supplies furnished in the port to which she belongs, whether all the owners are in such place or not. *Prima facie* their liability is identical with that of persons in the relation of copartners, as joint contractors.

But if any one of the owners arrogates to himself the control, to the exclusion, and against the wishes, of the others, and this assumption is known to the persons furnishing the supplies, thus showing that they act in collusion with the usurping owner, *it seems* the others are not liable.

The mere acceptance by the creditors, of a note, from one of the owners, is no proof, in itself, that the credit was given exclusively to him. Nor will it release the other owners, in the absence of proof that the note was taken as payment, and with the intent to discharge the other owners.

In an action against L., J. & B. as joint owners of a vessel, for supplies furnished for the vessel, at the request of B., proof by L. and J. that B. at the time the debt was contracted, not only acted in hostility to them and their interests, but took exclusive possession and control of the vessel, undertaking a voyage in express contravention of the wishes of the other owners, and that the plaintiffs knew this, is admissible.

But the mere hostility of B. to the other owners, in relation to the vessel and their interests in it, is not relevant, unless it also appears that he usurped exclusive control over the vessel, and undertook a voyage with her in direct opposition to them, and that the plaintiffs were aware of that fact, and acted collusively with him.

King *v.* Lowry.

Where a defendant has no separate defense, in an action on a joint contract, a co-defendant, called as a witness, can prove nothing that will not enure to his own benefit, as well as the benefit of his co-defendant; and as to such matters he is therefore interested, and of course incompetent.

APPEAL by the defendants Lowry and Jarvis from a judgment entered upon the report of a referee. The referee found and reported the following facts: that at the time alleged in the complaint, each of the defendants in this cause was a part owner of the steamship Pacific, which was then being fitted out for a voyage to California; that at the request of the defendant Brown, the plaintiffs sold to the owners of said ship, and delivered on board of the same as supplies or ship stores, for the use of said ship on her said voyage, the articles mentioned in the complaint, of the value of five hundred and twenty-six dollars and fifty-five cents, which sum, together with interest thereon to the date of the report, amounted to the sum of six hundred and twenty-eight dollars and eighty-three cents, the whole of which sum remained due and unpaid to the plaintiffs. For which sum, together with costs, the referee reported in favor of the plaintiffs; and judgment was entered for that amount, and the defendants appealed.

*J. Graham*, for the appellants. I. The referee erred in admitting parol proof of the contents of the bill. In order to entitle the plaintiffs to affect the defendants Lowry and Jarvis, by the rendition of a bill to Brown, a state of facts should have been established warranting the legal inference that the possession of one was the possession of all; showing that they were joint owners of the same vessel was not enough. (*Abbott on Shipping*, 107.)

II. The evidence as to the duplicate receipts was improperly received by the referee. Brown was not shown to be the agent or attorney of Lowry and Jarvis; no joint connection was established between them, beyond the owning of separate interests in the same vessel. Jarvis may have seen these receipts. It is not shown that Lowry saw them. The whole thing was treated as the individual matter of Brown, for it was amalgamated

with matters in which Lowry and Jarvis confessedly had no interest, and his note was given and taken in settlement of all of them.

III. The referee erred in refusing to dismiss the complaint, for the reasons urged on the hearing, viz. (1.) The defendants being joint owners of the steamship Pacific, were not liable as partners, but if liable at all, were liable as tenants in common, and the acts or declarations of any one could not bind all unless previously authorized, or subsequently sanctioned by all of them. (2.) There was not evidence on the part of the plaintiffs, sufficient to show that the defendants Lowry and Jarvis knew of, authorized, or sanctioned the acts, declarations, or conduct of the defendant Brown, in relation to the contracting of the bill sought to be recovered by the plaintiffs. (3.) There was not competent or sufficient evidence to show that the articles alleged to have been furnished to the steamship in question by the plaintiffs, and for which they sought to recover, were necessary, or needed, or intended for the voyage she was to perform. (4.) Upon the pleadings and the testimony it is apparent that the credit was originally given by the plaintiffs to the defendant Brown alone, and that he alone can be considered their debtor. (5.) Under the facts presented, in any aspect of the case, the defendants Jarvis and Lowry are not liable to the plaintiffs. (6.) In law the defendants Lowry and Jarvis were not liable to the plaintiffs.

IV. The referee erred in excluding the questions to the witness for the defendants, Lowry and Jarvis. The object of these questions was to show that in point of fact, Brown was not the agent of, or entitled to represent Lowry and Jarvis, and that he did not act as such or do so; on the contrary, that he acted in direct hostility to them. The plaintiffs' whole case had proceeded and been sustained upon the ground that there was a kind of partnership between all the defendants; even if the facts *prima facie* would have warranted such a conclusion as matter of law, the defendants Lowry and Jarvis were entitled to combat it, and could do so in no other

way more effectually than by showing what they offered. (3 *Kent's Com.* 155.)

V. The referee erred in refusing to allow the defendant Lowry to be examined for the defendant Jarvis, and so *vice versa.* At the most there was no joint liability on their part for the whole of the plaintiffs' claim, even though they might have been liable for a part proportioned to their interests separately. *Code*, § 394.)

VI. Unless Brown was shown to be the ship's husband, or in some way the recognized agent of Lowry and Jarvis, the action could not be sustained against the latter upon what Brown said or did; nothing like this was shown. The opposite of it was distintly proved. Lowry and Jarvis ordered things for the vessel, which were paid for by them. Unless the action can be sustained upon the idea *that for its purposes*, the several distinct owners of a vessel are liable for the acts of any one of them, the judgment below is entirely without any legal foundation. Although one of several joint owners may have an implied authority from the absent part owners to order for the common concern whatever is necessary for the preservation and proper employment of the ship, the rule does not apply when the owners are all present, as in this case. (3 *Kent's Com.* 155.) Joint ownership is the general relation between ship-owners. Partnership is the exception, and requires to be specially shown. (3 *Kent's Com.* 155.)

*H. H. Stuart*, for the respondents. I. The report of the referee, as to *facts* found by him, is like a verdict by a jury. To warrant the court in setting it aside there must be such a preponderance of evidence as to satisfy the court that there was either an absolute mistake on the part of the referee, or that he acted under the influence of prejudice, passion or corruption. (*Eaton* v. *Benton*, 2 *Hill*, 576. *Esterly* v. *Cole*, 1 *Barb. S. C. R.* 235. *Quackenbush* v. *Ehle*, 5 *id.* 469. *Spencer* v. *U. & S. R. R. Co.*, 5 *id.* 337.)

II. The evidence fully sustains the facts as reported found. (1.) It is charged in the complaint, and not denied in the an-

swer, that the defendants were joint owners of the vessel, and this ownership is admitted on the trial by the defendants' attorney, Mr. Jarvis. (2.) It is proved by Jennings, that the plaintiffs, at Brown's request, sold to the owners of the vessel, and delivered on board the vessel, the articles mentioned in the complaint. The same is also proved by Arthur J. Brown. The only other witness sworn was Mr. Jarvis, and he does not attempt to contradict the evidence of Jennings and Brown. (3.) These articles are proved to have been necessary stores for the vessel on her voyage. (4.) The plaintiffs show that they have not been paid, and produce the note taken on liquidation of the account.

III. A part owner of a vessel has power to bind his co-owners, for necessaries furnished to the vessel. (*Abbott on Shipping*, 6*th Am. ed.* 130. *Schermerhorn* v. *Loines*, 7 *John.* 311. *Muldon* v. *Whitlock*, 1 *Cowen*, 290. 3 *Kent's Com.* 156. *Collyer on Partnership*, 3*d Am. ed.* §§ 1255, 1256.) (1.) The fact that the seller knows of no owner except the one ordering the things furnished to the vessel, does not affect his right to resort to the other owners when discovered. (1 *Cowen*, 290, *cited above.*) (2.) Taking the promissory note of the particular owner who makes the purchase, and giving a receipt in full, does not preclude a resort to the other owners, in case the note is not paid, unless it is expressly agreed to take such note in discharge of the other owners. (7 *John.* 311. *Coll. on Part.* 1255, 1256, *cited above.*)

IV. The bill rendered by the plaintiff shows that the credit originally was not given to Brown, but to the *owners* of the vessel. This bill is shown to have been received by all the defendants. Lowry or Jarvis do not show that they have assumed, in their dealings with Brown, that he bought and paid for these stores individually, and have settled their accounts with him on that basis ; nor do they show any reason why the other owners of this vessel should not pay the plaintiff in case Brown failed to pay.

V. There is no evidence that Brown has paid the claim. The reply denies the allegation in the answer. It avers that the

whole claim for which Brown's note was taken remains unpaid, and offers to produce the note in court. The note is produced on the trial, and nothing appears to have been paid on it. If, in fact, any such payment had been made, the defendants would have attempted to prove it, even by calling the plaintiffs as witnesses.

VI. The offer to prove Brown's declaration was properly excluded. (1.) It was an offer by the defendants to prove their own declarations, made when the plaintiffs were not present. (2.) Disputes occurring between part owners of a vessel as to their individual rights, do not affect third persons not cognizant of such disputes, who furnish necessaries to the vessel.

VII. The offer of the defendants to become witnesses for each other was properly excluded. They were sued as *joint* contractors, and were *jointly* interested, and *jointly* liable. The code gives them no right in such cases to testify for each other. (*Code, sec.* 397. *Beal* v. *Finch*, 1 *Kernan*, 128. 4 *Comst.* 547.)

*By the Court*, CLERKE, J. This was an action against the defendants, as joint owners of a vessel, for supplies furnished for a voyage from New York to San Francisco. Judgment was recovered by default against Brown; the other defendants contending that the credit was exclusively given to him, while he had the control of the vessel; that the supplies were not necessary, and were furnished not only without their concurrence, but in direct opposition to their wishes, and while Brown was acting in open hostility to Lowry & Jarvis, in relation to the management of the vessel.

The plaintiffs offered in evidence parol evidence of the contents of a bill of the articles furnished, which had been rendered about the time of their delivery to Brown; having proved the usual preliminary notice to entitle them to the benefit of secondary evidence. This was objected to by the counsel of Lowry & Jarvis, on the ground "that a state of facts should have been first established warranting the legal inference that the possession of one was the possession of all; showing that they were joint owners of the same vessel was not enough." But if the joint

owners are jointly liable, and if the proof was introduced for the purpose of showing that the credit was given to the ship, it was sufficient to show the delivery of the bill to any one of the defendants, and its possession by him. It surely was not requisite to deliver it to all; and the mere circumstance that Brown was at variance with the other defendants, although it affected the relations between themselves, should not operate to the prejudice of the plaintiffs, unless it was shown that they acted in collusion with him, or that they gave him credit exclusively, expressly discharging the others. But this evidence was offered for the express purpose of proving the contrary to this, that the credit was given to the vessel, and not individually to Brown. It may, indeed, be the interest of the latter to withhold the bill, and endeavor to throw the payment of a portion of this demand on Lowry & Jarvis; but this is their misfortune, a mishap to which all persons engaging in business with others are often liable, but with which third parties have nothing to do. The plaintiffs proved that the supplies were delivered on board the Pacific, that they rendered a bill to Brown, that it was last seen in his possession, and that it had been inspected by the other defendants. Having proved that the usual notice was served on Brown to produce the bill, and Brown failing to produce it, I think it was proper to allow the plaintiffs to give parol evidence of its contents. The same remark will apply to the evidence relative to the duplicate receipts.

The referee having found the facts, that the defendants were joint owners, that the supplies were necessaries furnished to the Pacific, and that the credit was not given exclusively to Brown, in discharge of the others, the only questions remaining for us to consider are,

1. Can the acts and declarations of one joint owner, in relation to supplies furnished bind the others, unless expressly authorized or sanctioned by them?

2. Did the referee err in not allowing Lowry & Jarvis to show that during the months of February and March, 1851, Brown acted in hostility to them, in relation to the vessel and their interests in it?

3. Did he err in excluding the testimony of the defendant Jarvis?

In relation to the first question, it is well settled that joint owners of a vessel are primarily liable, at all events for supplies furnished in the port to which she belongs, whether the owners are in such place or not; that *prima facie* their liability is identical with that of persons in the relation of copartners, as joint contractors; but if any one of the owners arrogates the control, to the exclusion and against the wishes of the others, and not merely as husband of the vessel, and this assumption is known to the persons furnishing the supplies, thus showing that they act in collusion with the usurping owner, then I should say the others are not liable.

In this case, there is no proof of any exclusive control on the part of Brown, or any such collusiveness on the part of the plaintiffs. The mere acceptance on their part of a note is no proof, in itself, that the credit was given exclusively to Brown, or that it releases the other defendants, in the absence of proof that the note was taken as payment, and with the intent to discharge the other owners. *Schermerhorn* v. *Loines*, (7 *John.* 311;) *Muldon* v. *Whitlock*, (1 *Cowen*, 290,) and *Higgins* v. *Packard*, (2 *Hall*, 547,) are conclusive on this point, and have never been questioned.

2. Did the referee err in not allowing Lowry & Jarvis to show that during the months of February and March, 1851, Brown acted in hostility to them, in relation to the vessel and their interests in it?

The mere hostility of Brown to the others, in relation to the vessel and their interest in it, could not be relevant, unless they also showed that he usurped exclusive control over the vessel, and undertook a voyage with her in direct opposition to them, and that the plaintiffs were aware of this, and acted collusively with him. Nothing of this kind was attempted. On the contrary, the very witness by whom they offered to show the hostility of Brown, testified that Lowry & Jarvis ordered other ship stores, from other parties, for that voyage, showing that this voyage was with their knowledge and consent. If indeed they

offered to show that Brown not only acted in hostility towards them, but took exclusive possession and control of the vessel, undertaking a voyage in express contravention of the wishes of the other owners, and that the plaintiffs knew this, such testimony, in my opinion, would have been admissible.

3. Did the referee err in not allowing the defendant Jarvis to be examined as a witness for the defendant Lowry?

The offer was made without qualification, except that the testimony of Jarvis should not be used for himself. This is not enough; he could only be examined as to any matter in which he was not jointly interested or liable with the other defendant. He could have shown, for instance that Lowry was not a joint owner at all, and if the offer was limited to this, Jarvis ought to have been examined; but not if the object was to negative the liability of the owners of the vessel, whoever they were, or to reduce the amount of the claim; or to show that the credit was given exclusively to Brown; for in all such questions he was jointly interested with Lowry, and in relation to them a separate judgment could not be rendered. Where a defendant has no separate defense in an action on a joint contract, a co-defendant called as a witness could prove nothing that would not enure to his own benefit, as well as to the benefit of his co-defendant; and as to such matters he is, therefore, interested, and of course incompetent. (*Beal* v. *Finch*, 1 *Kernan*, 132, *Judge Parker's opinion.*) Jarvis & Lowry, if liable at all, are liable as joint contractors with Brown.

On the whole I see nothing to warrant us in disturbing the finding of the referee.

Judgment affirmed, with costs.

[New York General Term, September 3, 1855. *Mitchell, Clerke* and *Bowles*, Justices.]

## Creighton and wife *vs.* Josiah Ingersoll.

In an action for a partition, after the plaintiff's attorney had become entitled to certain fees for his services, and to over $100 for disbursements, the plaintiffs assigned their shares in the property to C. and wife, and one of the plaintiffs assigned also all costs and allowances that *he* might have, by the suit. The assignees claimed the right to substitute a new attorney, and continue the suit, without paying the former attorney any thing. The court refused to allow the substitution until the *disbursements* were paid. Subsequently, the property being sold, and the plaintiff's costs brought into court, *it was held* that the assignment did not transfer any costs or allowances to which the attorney was entitled, but only those belonging to the assignor.

It was *further held* that when C. and wife took an assignment of the action as it stood, and the benefit of the progress then made in it, they took it with the burthens then incident to it, one of which was the liability to have the costs then incurred deducted from the recovery by them. The amount of costs due to the former attorney, as adjusted previous to the substitution, was therefore directed to be paid to him, before paying over the fund in court to the plaintiffs.

APPEAL from an order made at a special term, directing the payment to the plaintiff, John Creighton or his attorney, of the sum of $259.01, for the costs and disbursements of the present and former plaintiffs, out of a fund in court arising from the sale of property in a partition suit.

*James L. Phelps, jun.* for the appellant.

*Wm. B. Aitkin*, for the respondents.

*By the Court*, Mitchell, P. J. This action was first commenced by W. F. Ingersoll and wife, for the partition of certain premises. After their attorney had become entitled to certain fees for his services, amounting according to the present system, if the adjustable costs are the standard of his pay, to between $70 and $80, and had disbursed over $100 in the action, the then plaintiffs assigned their shares of the property to the present plaintiffs, and the latter insisted they had the right to substitute a new attorney and take advantage of all that had been done, without paying the former attorney any thing. This court, at general term, refused to allow the substitution until all the disbursements were paid. Since then the property has

been sold, and by the judgment all the costs of the plaintiffs were to be deducted from the fund before the shares should be distributed to the owners. The shares have been distributed, and the costs brought into court, in order that the court might determine who was entitled to them. The present plaintiffs produce an assignment to themselves of the share of the former plaintiff, dated December, 1851, but not proved until January 10, 1854, and by it W. F. Ingersoll, one of the former plaintiffs, assigns, besides his share in the lands, also all costs and allowances that *he* might have by this suit.

If the assignment could affect the rights of the attorney, it should be shown that it was executed before the attorney had acquired any better rights. But it does not purport to transfer all the costs in the suit, but only the costs and allowances that Ingersoll himself might have—not any which his attorney might have. It would be supposing both the assignor and assignees were intending a fraud, to suppose that they meant to assign costs to which the attorney was entitled. It could have been the assignor's only fair intention to assign what he was fairly entitled to, beyond what belonged to his attorney; and that might be for some allowance that might be made to him, rather than to his attorney. The attorney was entitled to some compensation for his services. Under the old system the fee bill would be the standard of his compensation, so far as it provided for specific services. Under the code the party and his attorney are not restricted to that rule of compensation, but may show any other, agreed upon between them. It may be more or less than the adjustable costs, and whichever it be, the attorney is entitled to some compensation; and nothing in the code professes to repeal the system under which the lawyer had a lien on the costs for his payment. The fund is in court, and the court can and ought to hold it for the benefit of the one equitably entitled to it. And as no one can have a more equitable title than the one by whose exertions the whole fund was created, the court should see that he is paid before any one else carries away the fund. That the attorney was not to have less than his adjustable costs appears from his having recovered a judgment against

his client for five hundred dollars, for his services. But that remains unpaid.

The assignees, when they bought, must have known that the attorney would have a claim for those costs. And when they took an assignment of the action as it stood, and the benefit of the progress then made in it, they took it with the burthens then incident to it, and one of these should be the liability to have the costs then incurred deducted from the recovery by them, when judgment should be obtained.

Let the sum of $79, the costs as adjusted before the substitution, be paid to James L. Phelps, Esq. the former attorney, and the rest of the fund in court to the plaintiffs. And let the order of the special term be modified accordingly.

[New York General Term, September 3, 1855. *Mitchell*, *Roosevelt* and *Morris*, Justices.]

## Grady *vs.* Ward.

20 543
92a 105

Where the title to property purchased at a foreclosure sale was objected to, on the ground that the order of court authorizing the execution of the mortgage was void as against devisees, it was *held* that the title would be rendered good by the execution of a release by the devisees.

And the devisees being of age and consenting to release their interests, and the release having been ready before the hearing; it was *further held* that the purchaser was not excused from taking the title.

If the title of a mortgagor is good by adverse possession, that is such a title as a purchaser at a foreclosure sale is bound to take.

THIS was an appeal by Edward Cavanagh, the purchaser at a foreclosure sale, from an order made at a special term, directing him to complete his purchase. The mortgage foreclosed was executed, on the 19th of April, 1844, by John Power, sole surviving executor of Michael Smith deceased, in pursuance of an order made by the vice chancellor of the first circuit, on the 18th of April, 1844, upon the petition of said John Power. It was given to secure the payment of $1700 to

the plaintiff. The other facts are set forth in the opinion below, delivered at special term, by.

Roosevelt, J. "A motion is made in this complaint to compel the bidder at a foreclosure sale to complete his purchase. He objects on the alleged ground of insufficiency of title. Michael Smith, through whom it appears the title is derived, died many years ago, but after the revised statutes of 1830, leaving a will in which he left the property in question to three trustees of whom Dr. Power was the survivor, in trust to pay the net rents to his daughter, (Mrs. Ward,) and on her death to divide the property equally among her issue, each to receive his or her share at twenty-one, or marriage, and the rents in the meanwhile to be applied to his or her support. Mrs. Ward died after her father, leaving two infant children, named Ann and William. Ann came of age five or six years ago, and was then of course entitled to a conveyance of the one undivided half of the premises. Under the statute, however, no formal conveyance was necessary. The trust ceased as to her half, and with it the trustee's title, (§ 68 of the statute of trusts;) and by the 47th and 49th sections, the estate of the trustee was divested, and the beneficiary became immediately seised of the "legal estate," as well as entitled to the "beneficial interest." William's half, however, he being a minor still, remained in trust until November, 1854, when his minority terminated, and his legal estate commenced. From that period the two grandchildren of Smith, whether regarded as his sole heirs at law, or his sole beneficiaries by will, were the only persons having any interest, legal or equitable, in the property. Their release, therefore, assuming Smith's title to have been good, would cure all defects, if any, in the antecedent proceedings; and such a release, it appears, has been actually executed and tendered. But independently of the release, the statute in relation to mortgages, declares, that a chancery deed on a foreclosure shall be "an entire bar against each of them (the mortgagors and mortgagees) and against all parties to the suit." Now, the grandchildren were both parties to the suit in which the de-

cree of sale was made; and it is not pretended that there were any other parties in interest claiming under Smith. Whether the mortgage then executed by Power, as surviving trustee and executor, was duly authorized or not, and whether the order of the vice chancellor which allowed it to be given was valid or not, is immaterial. After the decree of foreclosure, the adult defendant was "barred" from raising the question; and after a sale in good faith, under the decree, (especially a sale beneficial to his interests,) the infant was equally barred.

But the trustee, it is said, was not a party to the foreclosure suit, and he therefore could not be barred by the decree. He was not a party, because, being dead, he could not be. But the court, it is urged, the trust having by law devolved upon it, should have appointed a substitute. The court in effect did so; it directed a sale and appointed a referee to conduct it, and a guardian *ad litem* to take care of the infant's rights. And even if any formal irregularities had taken place, and the minority still continued, the court, acting for the infant, and having in its character of guardian and trustee full power, would now remedy all such defects. But they are remedied already, and remedied effectually by majority and release.

Passing over all the niceties, a more fundamental objection—one on which the counsel for the purchaser lays the greatest stress—presents itself in the alleged want of title in Smith, or Smith's successor. Smith, it appears, purchased the property—then vacant ground—of William Bayard more than thirty years ago, and immediately entered into possession, and erected permanent buildings upon it. Bayard, it is clear, claimed to be and acted as owner; and from the evidence, although not entirely complete for the whole period, it is obvious that the property had been assessed to him as owner, and that he paid the taxes on it, as owner, for fourteen years previous, showing an undisturbed possession for nearly half a century, during which, one set of parties did no act and made no claim, while the other, uncontradicted and undisturbed, did both. In such cases, the law is well settled that a deed, with its execution and loss, may and ought to be presumed. Even where a trust

existed, the court in *Jackson* v. *Brooks*, (8 *Wend.* 426,) presumed a conveyance after twenty-eight years. In *Jackson* v. *Miller*, (6 *Wend.* 228,) a partition, which is only a particular mode of conveyance, was presumed. In *Jackson* v. *McCall*, (10 *John.* 377,) a conveyance was presumed after the death of a party, and subsequent possession by his heirs for eighteen years. Such presumptions are indispensable to the quiet of titles and the peace of families. Absolute certainty is seldom attainable in human affairs; in titles to land, almost never. If thirty years' undisturbed possession under an absolute deed, and that preceded by fifteen more in the maker of that deed, with no claim or suspicion of claim elsewhere, be not sufficient to constitute a merchantable title, it would be difficult to find one, short of a patent from the state. And were the price in the present case as good as the title, the purchaser, I am inclined to think, would have viewed the matter in the same light. Besides, the purchaser has actually taken and retains possession. He has no right to say he holds as lessee, for his lease had expired, and unless in as purchaser, he would be in as trespasser—a position which no man is allowed by law to assume. He is therefore in the precise condition which renders a release appropriate, and makes it incumbent on him to accept that species of assurance. Having no doubt of the sufficiency of the title, I cannot do otherwise than grant the plaintiff's motion."

*Jas. W. White*, for the purchaser.

*R. B. Roosevelt*, for the plaintiff.

*By the Court*, MITCHELL, P. J. The purchaser in this case, objects that the title is not good. It may be that the order of the vice chancellor, authorizing the execution of the mortgage which was foreclosed, was void as against the devisees under the will, and yet the title would be good if those devisees would release. They are of age and consent to a release; and as there has been no unreasonable delay in proving the release, and it was ready before the hearing at the special

term the purchaser is not excused from taking the title. (*Dutch Church in Garden street* v. *Mott*, 7 *Paige*, 85.) The title of the mortgagor is good by adverse possession. That is such a title as a purchaser is bound to take, even on a judicial sale.

Order of the special term affirmed, with costs.

[New York General Term, September 3, 1855. *Mitchell*, *Roosevelt* and *Morris*, Justices.]

## Van Neste *vs.* Conover.

20 547
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In an action to recover the possession of a quantity of corn, purchased by the defendant for cash, and delivered to him on the promise of immediate payment, it appeared that the defendant assured the vendor's agent that the money to pay for the corn was arranged for, and that the vendor could have it as soon as the corn was delivered on board a ship; and upon that condition the corn was delivered to the defendant, who, on various pretexts avoided the payment of the money, for several days, and the vessel sailed for Europe, with the corn on board; the defendant on the same day she sailed, executing a general assignment of his property to trustees for the benefit of his creditors, he being insolvent at that time and at the time of the purchase, and having obtained advances upon the bills of lading, and applied them to other purposes. *It was held* that both on the ground of fraud, and of a conditional sale and delivery, the plaintiff was entitled to recover; and a verdict in favor of the defendant was set aside, as being against the weight of evidence, and a new trial was granted.

Such an action will lie, although the goods have been transferred to another, as security for a debt, and are on board ships and not under the manual control of the purchaser when the action is brought. The judgment being in the alternative, for the return of the property or the payment of its value, the defendant, if he has not the property, can satisfy the other requirement of the judgment, and pay the value.

APPEAL by the defendant from an order made at a special term, granting a new trial. The action was brought to recover of the defendant the possession of 6261 bushels and 14 pounds of corn, of the value of $3443.69, and the damages and expenses incurred by the wrongful detention thereof. The jury

found a verdict for the defendant. The following opinion was delivered at the special term:

ROOSEVELT, J. "This suit is brought to enforce the restitution of a large quantity of corn, six thousand bushels and upwards, purchased by the defendant for cash, but never paid for. It appears that, although giving assurances of payment on delivery, and representing that he had made arrangements for that purpose, he was at the time utterly insolvent, and if the purposes of his mind are to be judged of by his acts, had no intention of paying at all.

The suggestion that the bad news received by him from Europe on the 6th of April, was the cause of his stoppage, is refuted by dates. How could letters, the contents of which were unknown till the 6th, have influenced the non-payment on the 2d, 3d, 4th and 5th? It is not usual for effects to precede their causes. He admits, as I read his answer, that he was to pay on delivery; but allowing, as he now contends, that by *cash* was meant payment in two or three days, even in that view, the delivery having been completed on the 2d, he had failed before the 6th. Nothing had occurred, or is pretended to have occurred, between the time of purchase and the time of payment, to create or to warrant a change of intention. The inference, therefore, is irresistible, that in the very act of buying *he deliberately purposed not to pay.* It has been held, and very justly, that such a purpose, entertained at the time, and carried into effect, is a fraud on the vendor, and vitiates the contract of sale. (1 *Hill*, 311. 13 *Wend.* 507.)

The defendant's counsel contends, that, to avoid a sale on the ground of fraud, or false pretenses, there must be misrepresentation, not of a promissory character, having reference to the future, but an existing fact; and that assuming that his client, when negotiating the purchase, did say that he had "made arrangements to pay the money as soon as the corn should be weighed on ship-board," the statement in that particular, as a matter of fact, was true. But when a party not only promises to do a thing which he is able to do, but accompanies

his promise with an assurance that he *intends* to do it, when in truth he intends the very opposite, is not this a false representation of an existing fact? Are there no facts except those existing in the physical world? Are mind, and the creations of mind, nothing? There is high authority for the doctrine that words are things; and if words, why not the mental conceptions, of which words are the mere clothing? Intention, like other hidden works of the intellect, may sometimes be difficult of proof; yet it is none the less a fact, an existing fact; and the law, in spite of all its difficulties, has made the judicial determination, not of questions of property merely, but of liberty, and even of life, to depend upon this kind of fact. Intention, not unfrequently, is the only distinction between a breach of trust and larceny; and, in the trial of life and death, it constitutes the broad boundary between murder and manslaughter. Its existence or non-existence, therefore, in contemplation of law, can be proved like any other fact.

In the present case, as already stated, I consider the fact of the intention not to pay, as abundantly established. The defendant made the purchase on the afternoon of the 29th of March, being utterly insolvent at that time. He made immediate arrangements with third parties to obtain advances on the corn. On the 1st of April, before the whole quantity had been fully delivered on board the ship, and while the lighters were still alongside, he hurried to the ship-owners and procured the bills of lading. These he forthwith transferred to the parties making the advances, who on the 2d forwarded them by the steamer to Liverpool. Having thus put himself in funds, by creating a lien on the property purchased, what did he do with those funds? On the afternoon of Tuesday, the 2d of April, the measurer's return was sent to him, but the clerk "brought back no money." "I saw the defendant (says the witness) the next day; I think twice; I asked him for payment; I wanted the money; he put me off, saying it was steamer day; I saw him again; he told me that his parties, whom he was to have the money from, (he had the money in his pocket,) were so much engaged that they had not time to give him the money, but I might rely

on it early next morning; the next morning between 9 and 10 o'clock, I sent another clerk; he went and returned and said Conover was not in; I started immediately myself; again he was not in; he did not come; I made an arrangement to meet him on 'Change; he did not come till late, near 3 o'clock; I immediately asked him for the money; he said (with the money, be it remembered, in his pocket) he was ashamed to say that his party had disappointed him, but that I might rely upon it before 10 o'clock next morning; I went again next morning to his office; he then told me his father-in-law was dead, but his book-keeper would bring me the money during the day; this was on Friday, the 5th; I saw the book-keeper on 'Change where he was to bring the money; I did not get it; I went to defendant's place of business again next morning; did not see him, but the book-keeper said he would not or could not do any thing about it." This was on Saturday. On the Monday following, the ship, with the corn on board, being two days behind her time, sailed for Liverpool, and the defendant, at the same time, executed an assignment of all his estate, real and personal, of what nature or kind soever, for the benefit of his friends and relatives and other preferred creditors. With such a narrative of pretenses and prevarications, can there be a reasonable doubt that when he purchased, he had no intention to pay? I lay no stress on the letters received by him on the 6th, as it is palpable that they had no influence on his previous conduct on the 1st, 2d, 3d, 4th and 5th.

In addition to the ground of fraud, the plaintiff insists, (and I see no incompatibility in his doing so,) that the sale made by him was conditional; that no title to the corn was to pass unless paid for in cash on delivery, and that this condition—deemed essential to the contract, it being addmitted by the defendant himself that the purchase was not on credit—was not waived by merely putting the corn on board the ship.

The proof, it seems to me, makes out this branch also of the plaintiff's case. Indeed, the defendant, in his answer, which moreover is under oath, uses language sufficiently strong, to dispense with other testimony. "As the sale (he says) was for cash,

this defendant probably did say, *that he would pay for the corn on its delivery*, he at the same time fully expecting to be able and intending to make such payment." Was this condition waived by a delivery without immediate payment, or by any other act or declaration of the plaintiff? An article like corn, requiring to be measured or weighed out, it is obvious, could not be delivered all at once. The passing of each successive bushel into the hold of the vessel could not constitute a delivery of the whole or even of that particular bushel. Although sold for cash, no payment was demandable until possession had been given of the entire quantity sold. If mere change of possession, then, in such a case, does not make out an absolute delivery, we must inquire what further was necessary.

Long acquiescence has sometimes been considered sufficient. But here, instead of acquiescing, the seller, as soon as the measurer's returns were ready, demanded his pay; or in other words, insisted on the fulfilment of the condition of cash on delivery. He continued his demands daily, and was daily evaded, until the ship and the corn had passed beyond his reach—all in less than one week. In all this I see no evidence of waiver, but the reverse. And had the corn remained in the defendant's hands, and not been pledged to a *bona fide* lender, the verdict of the jury, I doubt not, would have restored it to the plaintiff. Can, then, the wrongful hypothecation, superadded to the fraudulent purchase and broken condition, improve the wrongdoer's case?

It is said that an action to recover the possession of specific personal property, against a party not having the control of it, involves an absurdity. If so, the old common law, so long considered 'the perfection of reason,' was guilty of folly; for certainly replevin could formerly have been maintained in such a case, as is sufficiently demonstrated by the antique writ of *capias in withernam*. But independently of authority, I see no absurdity in the nature of the proceeding. Suppose a judgment, in this very case, to be recovered against the defendant, for the specific corn described in the complaint, where is the difficulty in executing it? The defendant has only to dis-

charge the lien created by himself, and reclaim the possession from the party who made the advances—or purchase a like quantity of the article of the same quality—or provide himself with a sum of money equivalent in value, and the difficulty would disappear. At all events, he cannot be permitted to set up inconveniences, if any exist, created by his own wrong, as a defense to an action, otherwise clearly maintainable.

With respect to the assignment of the 8th of April, it did not profess to pass any property of which the assignor was not the just and lawful owner; and if it had, its only consideration being the security or payment of the antecedent debt, the assignees would acquire no title under it, as against the equitable claims of third parties. The consignees who made the previous *bona fide* advances, I have considered as standing upon a different footing; although, according to the doctrine laid down by the supreme court, in the case of *Andrews* v. *Dieterich*, (14 *Wend.* 31,) even they would seem to have no rights sufficient to defeat the title of the original owner. But not being parties to this suit, it is unnecessary, and would perhaps be improper, to express a decided opinion with respect to their claims.

As the verdict, in my view of the whole case as above stated, appears to be clearly against right, I have concluded that it ought to be set aside and a new trial had, leaving the question of costs to abide the event."

*C. O'Conor*, for the appellant. I. The form of the plaintiff's remedy was misconceived. The property having been, in good faith and in due course of business, shipped to Europe, and being, at the commencement of the action, actually out of the possession or power of the defendant, and beyond the jurisdiction of the court, the plaintiff cannot recover. (1.) To maintain the action it is not enough that the defendant should be responsible as in *tort* for an unauthorized conversion of the plaintiff's property. Replevin is not, to all intents, a concurrent remedy with trespass or trover. If, at the time of the action brought, the plaintiff has not an actual subsisting right to the possession of the property, he cannot recover. (2.) If the property had not

been removed the sheriff could not have taken it; for the pledgees held it by a paramount title. (*Mowrey* v. *Walsh*, 8 *Cowen*, 238. *Root* v. *French*, 13 *Wend.* 570. *Andrew* v. *Dieterich*, 14 *id.* 31.) (3.) The intense severity of the remedial processes allowed to the plaintiff in this action, can only be justified on the assumption that the defendant still has power over the property and could surrender it to the sheriff; but, perversely, and in contempt of the process of the court, willfully detains it. (*Van Neste* v. *Conover*, 8 *Barb.* 509; *S. C.* 5 *How. Pr. Rep.* 148.)

II. Neither the sale nor the delivery was conditional. (1.) Every sale is in judgment of law a sale for cash, unless accompanied by an express stipulation for a *specified term* of credit. The mere *absence* of such express stipulation works precisely the same effect as the *presence* of an express promise *fairly* made to pay cash on demand. (2.) When a delivery is duly made in reliance upon the promise to pay on demand, and the purchaser has, in good faith, acted upon it, and disposed of the property by sale, pledge or other irrevocable appropriation, the law will not allow the seller to repent of his confidence and rescind the sale; thereby turning what was a bona fide *contract* into a *tort*, robbing a third person of his honestly acquired title, and subjecting to strict incarceration, as a malefactor, the unfortunate trader who, without guile or malpractice, has been overtaken by misfortune, and deprived of the ability to fulfill his promise. (*Smith* v. *Lynes*, 1 *Selden*, 41.) (3.) In all the cases in which a perfected delivery upon a cash sale has been adjudged rescindable, there has been proved some trick or artifice working a surprise upon the vendor. Whenever the contract is honestly made, and the intention to pay is not disproved, and the delivery is voluntarily and understandingly made by the vendor in the usual course, relying merely upon the promise to pay, the property passes. (*Chapman* v. *Lathrop*, 6 *Cowen*, 110. *Lupin* v. *Marie*, 2 *Paige*, 169; *S. C.* 6 *Wend.* 77. *See review of the leading cases in Smith* v. *Lynes*, 3 *Sandf. S. C. R.* 209.)

III. The case, fairly viewed, affords no evidence of an intent not to pay, which is the only fraud that could be pretended.

Every circumstance brought forward to excite suspicion is fairly met, and every inference of guile on the part of the defendant satisfactorily repelled. The learned justice at special term mis apprehended the facts. (*Gallager* v. *Brunel*, 6 *Cowen*, 346. 18 *Wend.* 609. 1 *Rawle*, 315. 6 *Harr. & John.* 256, 426. 9 *Watts*, 572. *Alston* v. *Mech. Mu. Ins. Co.*, 4 *Hill*, 342.)

IV. This is an excessively *hard action.* The plaintiff had a fair trial on all the evidence; the charge was so favorable to him that he took no exception. To award a new trial in such a case, is contrary to the settled practice of the courts, and amounts to the violation of a fundamental maxim. In these cases *quasi* criminal *nemo debet bis vexari pro eadem causa.* (*People* v. *Superior Court*, 5 *Wend.* 114; *S. C.* 10 *id.* 289.)

*Wm. Curtis Noyes*, for the plaintiff. I. The defendant's answer admits the sale of the corn to have been for *cash on delivery;* and the mode of delivery, demand of payment, and the time thereof proven on the part of the plaintiff not having been contradicted by the defendant, it is a question of law whether the delivery was of such a nature as to pass the title, and it should have been, and should be passed upon by the court as such. (*Hill* v. *Hobert*, 4 *Shep.* 164. *Van Neste* v. *Conover*, 4 *How. Pr. Rep.* 149. 8 *Barb.* 509.)

II. Where an article like grain is sold to be paid for on delivery, in such quantities that it cannot all be conveyed at once to the place of delivery, the delivery is not complete, nor does the title pass until the whole quantity has been delivered, and the amount ascertained and paid for, unless after the ascertainment of the amount, credit for the price is given, or the condition as to the payment waived in some other way. (*Chit. on Cont.* 392, *notes. Story on Sales*, § 313. *Andrews* v. *Dieterich*, 14 *Wend.* 31. *Ward* v. *Shaw*, 7 *id.* 404. *Strong* v. *Taylor*, 2 *Hill*, 326. *Rapelye* v. *Mackie*, 6 *Cowen*, 253. *Lawrence* v. *Williams*, 4 *Camp.* 181. *Whitwell* v. *Vincent*, 4 *Pick.* 449. *Leven* v. *Smith*, 1 *Denio*, 571. *Lucy* v. *Bundy*, 9 *N. Hamp. R.* 208. *Hill* v. *Freeman*, 2 *Cushing*, 257. *Tyler* v. *Same*, 2 *id.* 261.)

III. A delivery of personal property, to pass the title, means something more than the passing of an article from one to another; it must be a delivery absolute in its nature, and with the intention to pass the title, leaving nothing to be done by the party to whom delivered to make his right to retain perfect. (*Leven* v. *Smith*, 1 *Denio*, 571. *Whitwell* v. *Vincent*, 4 *Pick.* 449, *and cases cited above.*)

IV. The letters offered by the defendant were improperly admitted in evidence. They were not evidence against us for any purpose. (*Maesters* v. *Abrams*, 1 *Esp. N. P. R.* 375; *S. C.* 10 *Ves.* 127. *Kahl* v. *Jansen*, 4 *Taunt.* 566. *Langhorn* v. *Allmet*, *Id.* 511. *Keyner* v. *Pearson*, *Id.* 663. *Towle* v. *Stevenson*, 1 *John. Cas.* 110.)

V. The judge should have instructed the jury that as the evidence of the plaintiff was undisputed as to the terms of sale, and that it was a conditional one, and as to the presentation of the bills, as soon as the amount had been ascertained, there was no question that a delivery had not taken place, the corn not having been paid for in pursuance of the condition. (*Van Neste* v. *Conover*, 4 *Howard's Pr. Rep.* 149. *Hill* v. *Hobert*, 4 *Shep.* 164. *Hill* v. *Freeman*, 3 *Cushing*, 257.)

VI. The verdict was contrary to evidence; for the evidence proved, (1.) That the terms of the contract were never waived; that no credit was given; and that the sale and delivery were only conditional. (*Graham on New Trials*, 361, 2, 5. *Jackson* v. *Parker*, 9 *Cowen*, 73. *Story on Sales*, § 313. 2 *Kent's Com.* 497, 8. *De Wolf* v. *Babbet*, 4 *Mason*, 294.) (2.) That the defendant, having got the corn on board the ship, fraudulently appropriated it by getting bills of lading, and procuring advances upon them. (3.) Upon these facts there was no contrariety of evidence, nor any dispute whatever, and the jury either forgot or disregarded the testimony, and gave a verdict contrary to law and evidence.

VII. No formal exceptions to the charge were necessary on the trial to bring up the questions of law now presented; the case alone is enough. (*Code*, § 264. *Archer* v. *Hubbell*, 4 *Wend.* 514.)

VIII. Judgment should have been ordered for the plaintiff on the pleadings and evidence; and as the verdict has been set aside, and a new trial granted, the order to that effect should be affirmed with costs.

*By the Court*, MITCHELL, P. J. This appeal is from an order of the special term, granting a new trial, on the ground that the verdict was against the weight of evidence. The court does not, generally, interfere with the verdict of a jury, unless it is clearly against the weight of evidence. If any case should be an exception this ought to be, as the case was presented to the special term, and to the general term, on former occasions, on affidavits exhibiting substantially the same state of facts as appeared at the trial; and both tribunals considered a case of fraud or of conditional sale, made out, and in that conclusion the judge whose order is now appealed from concurs.

The facts are such that they should be again submitted to a jury. The defendant obtained all his means which he had in business, by advances; and when he commenced his winter or spring dealing in flour and corn, in February, 1850, he owed $4000 or $5000 which he had contracted in the preceding summer, and which was still due, at the trial. Between Feb. 1850, and his failure in April of that year, his purchases amounted to $245,000. He bought the plaintiff's corn of Mr. Melick on the 29th of March of that year. Melick stated to him that he wanted to sell to some one who could give the cash as soon as the corn was out of the barges; and expressed his doubt whether the defendant could so pay, and reminded him that he had been buying largely, during the winter and spring. The defendant replied that he had paid for those purchases; that he did not depend on his own resources to pay for the corn; that he had arrangements with other parties for the pay, and although he was buying a large amount of corn to send abroad, yet he only occasionally took a little interest for himself in the purchases; and that he had arrangements made with a party, then, for the pay for the corn; that he could give the money for the corn just as soon as it was all on board the ship. Melick finally told him

that if he could assure him that he had the money arranged for, so that he could pay for the corn when it was in the ship, he would send it alongside the ship. And the defendant assured Melick that the money was so arranged for, and that he could have the money as soon as the corn was all on board the ship, and on that condition Melick agreed to deliver the corn. The corn was all delivered on the 2d of April, and a bill sent to the defendant's store on the same day, for the money. On the 3d he was personally seen and payment demanded, and he said it was steamer day and *his parties* were very busy getting off their letters, and he could not get the check until after the steamer sailed; that Melick might rely on it early next morning. The next day came, and he said he was ashamed to say that *his party* had disappointed him, but that Melick might rely on the money before 10 A. M. the next day. Again, on April 5, the defendant made an excuse on account of the death of his father-in-law, and promised that the money should be paid during the day. It was not paid on that day, and his book-keeper gave assurances that it should be paid the next day. The next day, or the business day after, he failed. In the mean time he had obtained advances on this corn, and applied them to other purposes. The conduct of the defendant subsequent to the sale, was evidence of the motive which influenced him to make the purchase, and looks so much like a design to deceive and mislead, that it should be again submitted to a jury. If his representations are to be understood, (as it is insisted the cross-examination shows they should be,) as stating only that he had made arrangements that advances should be made on his corn generally, and such arrangements were in fact made, and he intended when he purchased the corn to pay for it, the imputation of fraud may be effectually repelled. If he meant, as the direct examination strongly tends to show, and his subsequent remarks confirm, that he made the purchases for other persons, who were to pay for the corn, and there is no proof that this was true, then the charge of misrepresentation is made out.

The evidence also shows a sale and delivery conditional on the payment of cash. There is no evidence to contradict this.

Yet the jury finds against it. If another jury shall infer from any circumstances that the delivery was intended to be a waiver of this condition, and there should be such circumstances as would justify such an inference, it may be conclusive. At present, such circumstances do not appear. If the delivery on board a foreign ship were alone proof of a waiver of the condition, then there could be no sale for cash, of corn to go abroad, without the payment being made before the delivery.

The question was raised, but not discussed, whether this action would lie, as the goods had been transferred as security to another, and were on board ship, and not under the manual control of the defendant when the action was brought. When this case was before the general term the first time, (8 *Barb.* 509,) it was held the action lay. And that was the main question then discussed, although the motion was to discharge the defendant from bail. Afterwards, in *Merrick* v. *Suydam*, (1 *Code Rep. N. S.* 212,) a further question was argued, whether the peculiar bail for the return of the property or the payment of the debt, can be allowed in these actions, even when the action lies, if the property, before suit brought, has passed from the defendant's hands and control without any intention to evade the process of the court. And it was held that it could not be allowed, as the plaintiff, to obtain such bail, must make an affidavit alleging, in the present tense, that the defendant *is* in the possession of the property; but the court still held that the *action* would lie. It may well lie; as the judgment must be in the alternative, for the return of the property or the payment of its value; and thus the defendant can, if he has not the property, satisfy the other requirement of the judgment, and pay the value.

The order granting a new trial is affirmed, with costs.

[New York General Term, September 3, 1855. *Mitchell*, *Roosevelt* and *Morris*, Justices.]

## LAYMAN *vs.* WHITING.

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29 302
7h 384
31a 160

In an action of ejectment the plaintiff is bound to show title in himself at the commencement of the action.

If the title upon which he relies is founded upon the foreclosure of a mortgage, by advertisement under the statute, proof of a regular and complete foreclosure is essential to the validity of that title.

The right of a mortgagee to acquire the title to the mortgaged premises upon a sale under the statute, is given, and the manner in which the title is to be transferred to him, is regulated, by statute.

In the absence of a deed to the purchaser, from the mortgagee, the affidavits of the publication and posting and service of the notices of sale, &c., take the place of such a deed, and operate as a statute conveyance. They are necessary, in order to complete the foreclosure, and transfer the title to the mortgaged premises; and until they are made and completed no title will vest in the purchaser.

And if, in an action of ejectment by the purchaser, it appears that the affidavit of service of the notice of sale upon the mortgagor was not made until after the commencement of the action, the plaintiff will fail to show title in himself at the time the suit was commenced, and must therefore be nonsuited.

The making and recording of an affidavit of service, after the commencement of the action, will not vest a title in the purchaser, *by relation*, as of a time previous, so as to enable him to recover.

Parol evidence of the service of the notice of sale, upon the mortgagor, is admissible; but it will not dispense with the production of the *affidavit* specified in the statute.

MOTION for judgment on a verdict for the plaintiff subject to the opinion of the court on a case made by the plaintiff. The action was ejectment. On the trial the plaintiff, for the purpose of proving a title in himself, gave in evidence a mortgage executed by the defendant to the plaintiff on the first day of April, 1852, on the premises in controversy, to secure the payment of $325 in three annual payments. The plaintiff then proved by proper affidavits the publication and posting of a notice of sale of the premises, pursuant to the statute and the power contained in the mortgage, for a default in the payment of the first installment, and a sale of the premises pursuant to the published notice, on the 20th day of July, 1853. These affidavits were recorded in the clerk's office of Chautauque county, where the premises are located, on the 6th day of August, 1853. It was admitted by the plaintiff that this action was commenced *on*

*the 22d day of August*, 1853. The plaintiff then called a witness and proved the service of a copy of the notice of sale on the defendant, by leaving it at his residence, in his absence, with his wife, on the 6th day of July, 1853, about 2 o'clock in the afternoon. This evidence was objected to by the defendant, on the ground that the proof should be by affidavit. The objection was overruled, and the evidence was received. The plaintiff then offered in evidence an affidavit of the witness, sworn to on the *20th day of September*, 1853, stating that the witness served the notice of sale on the defendant at the time and in the manner above stated. This affidavit was written on the same paper containing the affidavits of publication, posting and sale. The plaintiff also offered to read the certificate of the clerk of said county, of the recording of the said affidavit of service with the three other affidavits above mentioned. The defendant objected to the reading of this affidavit and certificate, on the ground that it should have been made and recorded before the commencement of the action. The objection was overruled, and the affidavit and certificate were read. By the certificate, it appeared that this last affidavit was recorded on the *20th day of September*, 1853. The evidence here closed, and the defendant moved for a nonsuit on the grounds, 1. That the notice of sale having been made on the 6th day of July, was not sufficient to authorize the sale on the 20th. 2. That the plaintiff had no title at the time the suit was commenced, because the proof of service of the notice of sale could not be made by parol, and that as the plaintiff relied on proof under the statute, as a substitute for a deed, the affidavit of service of the notice of sale was an essential part of the title, and that the title did not vest in the plaintiff until the affidavit was made and completed; which was not done until after the suit was commenced.

The motion was denied; and the court directed a verdict for the plaintiff, as above stated.

*D. Sherman*, for the plaintiff.

*E. Ward*, for the defendant.

GREENE, J. I think this motion should have been made at a general term, but as the parties have argued it here without objection, I have concluded to examine and decide it, and the motion can be renewed in form at the general term, if either party desires to review the decision, there.

The plaintiff was bound to show a title in himself at the time of the commencement of the action. The title upon which he relies is founded upon the foreclosure of the mortgage executed by the defendant, and proof of a regular and *complete foreclosure* is essential to the validity of that title. The only questions raised on the argument are, was parol proof of service of the notice of sale on the mortgagor sufficient, in connection with the other proof, to show title in the plaintiff; and if not, did the making and recording of the affidavit of such service *after the commencement of the action* vest a title in the plaintiff, by relation, *as of a prior time*, so as to enable him to recover?

The mortgagee's right to sell the premises is derived from the power contained in the mortgage, authorizing him, on a default in the payment of the mortgage moneys, to sell and convey the premises and pay the mortgage out of the proceeds of the sale. The manner of executing this power is now prescribed by statute. At common law the title could be conveyed only by a deed from the mortgagee to the purchaser, and as the mortgagee could not convey to himself, he could not acquire a title through the sale under the power. In 1808 a statute was passed authorizing the mortgagee to purchase. The provision will be found in 1 *R. L. p.* 375, § 10, and is in these words: "No title to mortgaged premises, derived from any sale made in virtue of a special power for that purpose, in the mortgage contained, shall be questioned, impeached or defeated, either at law or in equity, by reason that the mortgaged premises were purchased by the mortgagee," &c. This statute provided that notice of the sale should be published and posted a certain time before the sale, and that affidavits of such publication and posting and of the sale, when recorded as directed by the act, should be received in all courts as prima facie evidence of the facts stated in such affidavits. This act merely prescribed the man-

ner of executing the power so far as the *sale* is concerned, and made provision for perpetuating the evidence of the regularity of the sale, but made no provision as to the mode of *conveying the title.* In all cases except where the mortgagee was the purchaser, this was done, as at common law, by a deed from him to the purchaser; but as this mode of conveyance could not be adopted where the mortgagee was the purchaser, it was held that the title was transferred on a regular sale *by force of the statute.* (*Jackson* v. *Colden*, 4 *Cowen*, 266.) The deed of the mortgagee, in one case, and the statute in the other, transferred the title, and in either case, it was necessary only that the party claiming title through the foreclosure, should prove a due execution of the power of sale, or in other words, prove a compliance with the statute which prescribed the manner of that execution. These facts might be proved by affidavits, recorded pursuant to the statute, or by common law evidence.

By the revised statutes, title 15, ch. 8, part 3, (2 *R. S.* 545, § 3,) as amended by the laws of 1844, (*ch.* 246, § 5,) it is provided that in addition to the publishing and posting of the notice of sale, for the time therein prescribed, a copy of the notice shall be served at least fourteen days prior to the time therein specified for the sale, upon the mortgagor, &c. Sections 9 and 10 of title 15 provide for the making of affidavits of the publication and posting and service of the notice, and of the circumstances of the sale. Section 11 provides, among other things, that such affidavits may be filed in the office of the clerk of the county where the sale takes place, and section 12 provides for the recording of such affidavits by the clerk, and that "such original affidavits, the record thereof and certified copies of such records shall be presumptive evidence of the facts therein contained." By section 14 of title 15, as originally enacted, it was provided that where the mortgaged premises should be purchased by the mortgagee or his assigns, "*the affidavits of the publication and affixing notice of sale and of the circumstances of such sale,*" should be evidence of the sale and foreclosure, and "*without any conveyance being executed,*" in the same manner and with the like effect as a conveyance executed by a mortgagee,

upon such sale, to a third person, had theretofore been. By an amendment of this section passed in 1838, (*ch.* 266, § 8, *p.* 263,) it was provided that the same effect should be given to the *same affidavits*, when the mortgaged premises should be purchased by the mortgagee "*or by any other person or persons whatsoever.*"

It will be seen from an examination of these statutes that the mortgagee's right to acquire the title to the mortgaged premises on the sale, is *given*, and that the *manner in which the title is to be transferred to him*, is regulated by statute. The statute of 1808, which first gave him this right, as we have seen, provided no substitute for a conveyance, and contained no provision in relation to it; and from the necessity of the case, it was held that the title passed, *under the statute*, by the fact of the sale. The provision of the 14th section of title 15 of the revised statutes, that the affidavits therein mentioned, when the mortgagee was the purchaser, should *take the place of*, and have the same effect as, a conveyance, supplied this defect in the old statute, and made an important change in the law on this subject. The effect of that section, as amended in 1838, was to allow a substitution of those affidavits, *in place of a conveyance in all cases*, so that in case a third person purchases at the sale, this *statute conveyance* may now be adopted in the place of a conveyance from the mortgagee, which was always necessary before the amendment of 1838.

That conveyance may still be made by the mortgagee in such cases, under the power contained in the mortgage, and when made, I have no doubt that common law proof of the execution of the power according to the statute, may be made, in the place of proof by affidavit. In such a case, the affidavits are regarded as *mere evidence* of certain facts. By the statute they are made *prima facie*, but not exclusive evidence of those facts; and when regarded as *evidence*, I see no reason why common law evidence may not be resorted to in the place of the affidavits. But the same statute, under certain circumstances, assigns to these affidavits a very different office. In the absence of a deed from the mortgagee, they take the place

of, and *operate, as a conveyance;* and until the statute of frauds is repealed, I am unable to see how the title can pass without a regular conveyance from the mortgagee or this *statute conveyance* which has been substituted in its place. As I understand the case of *Arnot* v. *McClure*, (4 *Denio*, 41,) it establishes this precise proposition. That was an action of ejectment. The plaintiff claimed under a sheriff's deed given on a sale of the premises on a judgment against a former owner. The defendant claimed under a prior mortgage given by the judgment debtor, which had been foreclosed under the statute and the defendant had purchased the premises on the sale. *In the affidavit of sale* the premises were so described as not to include a part of the land described in the mortgage. The defendant offered to prove by the auctioneer who officiated at the sale, that in point of fact he offered and sold the whole of the mortgaged premises, and that a clerical mistake was made in the description, in drawing the affidavit of sale. The evidence was rejected, and the plaintiff had a verdict under the direction of the circuit judge, for the part not described in the affidavit of sale. The defendant moved, on a bill of exceptions, for a new trial, which was denied. Bronson, C. J. in delivering the opinion of the court said "the affidavits are a *statute conveyance;* and when they perform that office, the purchaser can no more impeach them by parol evidence, than he could a conveyance by deed." Some doubt is expressed in the opinion, as to the right of the purchaser, *under any circumstances*, to contradict the affidavits which he has procured to be made and recorded, but the reasoning of the learned chief justice proceeds upon the hypothesis, and the case is decided on the ground, that the affidavits prescribed by the statute, in the absence of a deed, constitute a conveyance, and are necessary to transfer the title. The learned chief justice proceeds to say "without a conveyance, or a substitute for it in the form of affidavits, the foreclosure is not complete, and the equity of redemption remains in the mortgagor. Where a deed has been executed to the purchaser, and there are no affidavits, the regularity of the proceedings may be established by any

good common law evidence. And though there may be affidavits, it is possible that *other evidence* may be admissible to supply defects, and show a sale in accordance with the deed. * * * Where there is no deed, and *affidavits supply its place*, they can neither be contradicted nor amended by oral evidence."

I think it must appear obvious, upon reflection, that the right to contradict the facts stated in the affidavits, or to prove facts by parol, in addition to those stated, must depend upon the question whether the affidavits are, under the circumstances, to be regarded as a conveyance or as mere evidence of the facts which authorize the execution of a deed, where one has been given. As I have before observed, the statute makes the affidavits *prima facie* evidence, and nothing mor

This cannot be held to exclude other competent evidence, and if a title could pass under the statute by a *mere sale* of the premises in pursuance of the provisions of the statute, I can see no objection to proving all of the essential facts by parol, or to supplying any omissions or correcting any mistakes in the affidavits when they are used as *evidence* of the same facts. But the provisions of § 14, substituting affidavits for a conveyance, are in addition to the provisions of § 12 making the affidavits evidence of the facts therein stated; and I think it must be held upon every principle of construction as well as upon the authority of adjudged cases, that in the absence of a deed, such affidavits are now necessary in order to complete the foreclosure and transfer the title to the mortgaged premises.

A difficulty arises in giving a construction to § 14, in consequence of the omission of the legislature to amend that section, when the amendment of the 3d section, requiring a copy of the notice of sale to be served on the mortgagor, was made, in 1844. It will be remembered that the 14th section as originally enacted, provided that "the affidavits of the publication and affixing notice of sale, and of the circumstances of such sale," should be evidence of the sale and foreclosure of the equity of redemption &c., without any conveyance, with the same effect as a deed of the mortgagee, executed upon a sale to a third person, had

before been. It is now argued by the plaintiff, that although service of the notice of sale is indispensable to the validity of the foreclosure, the title may still pass without an affidavit of that fact or a deed, provided the service was in fact made; and that the fact may be proved by parol. This argument is founded on a literal reading of the language of § 14, without regard to the amendment of 1844. The *deed of the mortgagee alone* was never evidence of the foreclosure. It was so regarded only when accompanied by due proof of compliance with all the provisions of the statute regulating the execution of the power of sale. The affidavits mentioned in the 14th section, were, by the 12th section, made evidence of those facts; and the true construction of the language of the 14th section, before the amendment of the 3d section, undoubtedly was, that those affidavits should be evidence of the foreclosure of the equity of redemption in the same manner and with the same effect as the deed of the mortgagee accompanied by proof of the facts necessary to authorize the execution of such deed. In other words, the affidavits were made an instrument of conveyance, as well as evidence of the facts authorizing the conveyance. It is clear, therefore, that the construction of the 14th section contended for by the plaintiff, will in effect annul the amendment of 1844. Upon producing the affidavits specified in § 14, the party claiming under the foreclosure would, by the strict letter of that section, be entitled to recover, without proof of any kind, of a service of the notice of sale on the mortgagor; for the section in terms makes those affidavits *prima facie* proof of a *complete foreclosure* of the equity of redemption of the mortgagor and all claiming under him; and as between such parties and the mortgagee, that proves a title in him. I am, therefore, of opinion that, in order to carry out all of the provisions of this act, those of § 14, in relation to the effect of the affidavits, must be read in reference to all the affidavits mentioned in the previous sections of the act as amended, and that all of those affidavits are essential, in the absence of a deed, to perfect the purchaser's title. The affidavit of service of the notice of sale on the mortgagor was not made in this case until after the commence-

ment of the action, and for that reason, I think the plaintiff failed to show a title in himself at that time.

I think the doctrine of relation, relied on by the plaintiff, is not applicable to this case. In all the cases cited, in which that doctrine has been applied, the act which was held to relate back to some prior act, and thereby vest a title as of the time of such prior act, was to be done by some party other than the one who invoked the aid of this doctrine; as in the case of a deed to be given by a trustee, or by a sheriff on a sale made by him on execution. In such cases it would be unjust that a party who had performed all the conditions on his part, which entitled him to a conveyance, should suffer by the neglect of the party whose duty it was to execute it; and this doctrine, somewhat artificial in itself, is resorted to to prevent such in justice. But where a title is to vest by a party's own act, and he shows no impediment in the way of its performance, and urges no reason for non-performance but his own neglect, I do not perceive the necessity or propriety of applying this doctrine in his favor. No precedent has been cited for it, and I think the principle of the doctrine is against establishing one in this case.

There must be a judgment of nonsuit on the verdict.

[Erie Special Term, January 1, 1855. *Greene*, Justice.]

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13a 378

JAMES G. WYNHAMER, plaintiff in error, *vs.* THE PEOPLE OF THE STATE OF NEW YORK, defendants in error.

The right to a bill of exceptions, in a criminal case, is given by statute; and its office is to bring up for review questions of law made and decided on the trial.

The statute which gives the right, limits it to exceptions taken on the trial of the *main issue*. It is not extended to such as are taken on the trial of preliminary or collateral questions, such as motions to quash the indictment for irregularity, challenges to the array, &c.

The last clause of section one of the act of April 9, 1855, for the prevention of

intemperance, pauperism and crime, excepting from the operation of that section liquor, the right to sell which "is given by any law or treaty of the *United States*," does not apply to liquor in the possession of a person who has purchased the same from the importer, in the original packages, and who retails the same from those packages, as it is called for.

The selling of imported liquor, by any person other than the importer, and such others as are allowed to sell, by the act, is therefore prohibited by the first section as qualified by the second and other sections of the statute. And upon the trial of an indictment, under the act, evidence by the defendant to show that the liquor sold by him was imported by another, from foreign countries, under the revenue laws of the United States; that the duties have been paid thereon; that he purchased the same from the importer, in the packages in which it was imported; and that it was drawn from those packages when sold by him, is immaterial, and should be rejected.

The right to sell imported liquor, given by the laws of the United States, is subject to two important qualifications; 1. That it remains in the hands of the importer; and 2. That it shall be sold in the condition in which its importation is authorized, and that all sales by other persons, or in any other quantity or condition than that in which it is imported, are subject, like the sales of all other property, to such regulations as may be prescribed by state laws.

The right is neither general as to persons, nor in its application to the property to which the laws of the United States relate. The right, on the contrary, is limited to *certain persons*, and qualified by the *status of the property*.

While it is in the hands of the importer, and in the condition in which it was imported, the laws under which he has imported it give *him* a right to sell it in that condition. This is the extent of the right. When he parts with the property, or changes its condition, his right, and *all* right to sell it, derived from those laws, ceases. It is no longer the right to sell which is given by the laws of the United States.

The prohibition of the sale of liquor, contained in the first section of the act for the prevention of intemperance, pauperism and crime, passed April 9, 1855, as it is qualified by the second and other sections, is not repugnant to the provisions of the constitution, but is a valid legislative act.

ERROR to the court of sessions of the county of Erie. The plaintiff in error was indicted for a violation of the "act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, (*Laws of* 1855, *p.* 340,) in selling brandy (not being liquor the sale of which was authorized by the laws of the United States,) to persons not authorized to sell liquor by the act above mentioned. The facts appearing upon the trial, and the questions there raised, are stated in the opinion of the court. At the close of the testimony, the defendant's counsel

requested the court to charge and direct the jury to acquit the defendant, on various grounds, specified. The court refused so to charge, and the defendant excepted.

The defendant's counsel asked the judge to charge that the people must prove that the liquor sold by the defendant was intoxicating. The court charged that if the defendant was proved to have sold brandy, that was intoxicating liquor within the meaning of the act. To which charge the counsel for the defendant excepted. The jury found the defendant guilty, and he brought a writ of error.

*F. J. Fithian*, for the plaintiff in error. The court of general sessions erred in excluding the evidence offered by the plaintiff in error, and admitted to be true by the people, that the liquor in question was "imported." This was material evidence, because the sale of "such liquor" is not prohibited by law and constitutes no offense known to the law.

I. The indictment in the case and the prosecution is under and by virtue of the act of April 9th, 1855, usually termed the "prohibitory liquor law." It seeks to bring itself solely within the provisions of that statute; refers to it by its title and concludes "contrary to the form of the statute," &c.

II. By the true construction of the 1st section of this act, all imported liquors are excepted from its operation, and are not within any of its penalties or prohibitions, and may be sold in this state by the large or small quantity, without subjecting the vender to any punishment or penalty. (1.) The true rule of construing statutes is to read and examine them by the words they contain, and according to the natural, most obvious import of the language used; and it is only when the language is obscure and ambiguous that it is allowed to resort to "comparison," "intention," or any other matter aside from the fair import of the language used. (*Smith on Statutes*, §§ 505, 545. 7 *Barn. & Cres.* 569. 10 *id.* 520. 1 *Kent*, 7*th ed.* 511. *Story on Const.* § 426. 15 *John.* 394. 13 *Mass. Rep.* 343, 4. 21 *Wend.* 561. *Dartmouth College case*, 4 *Wheaton*. *Vattel's Law of Nations*, *b.* 2, *ch.* 17, *pp.* 244, 245, 256. *Puffendorf*,

*p.* 13, § 12.) (2.) Adopting this rule of construction, it is clear that the concluding sentence of the first section of the prohibitory liquor law excepts from the operation of that section "LIQUOR;" not a right of sale of liquor, but the "liquor" itself in specie. (3.) The language of the exception itself assumes and declares that there are some *kinds or qualities* of liquor, the right to sell which "in this state" is given by law and treaties of the United States. (4.) All *imported liquor* has attached to it, by the laws of the United States, a right of sale "in this state." (*Brown* v. *Maryland*, 12 *Wheat.* 419.) And although that "right to sell in this state" is confined to specified persons, and while the liquor is in specified casks or packages, still as to *those* persons, and while *thus* kept, "*the right to sell in this state*" is absolute, perfect and unqualified. Here then is "*liquor*," answering in every respect the requisites and conditions called for by the *exception*. Why should it not be *within* the exception, and *without* the prohibition? 1st. The language of the exception is broad and full. It is not confined to any "persons," "packages" *or conditions of the liquor excepted.* 2d. The exception is not limited to quantity or kind, whether sold by the drink or by the cask. If Wynhamer's liquor ever was liquor, the "right to sell which was given, &c." then that liquor is not prohibited. (5.) This construction is in no respect in conflict with any other section or provision of the act. The 22d section of the statute contains no prohibition whatever. It sustains the exception in the first section, to the extent of sales by the "importer" in the "original package," and does not in any respect limit or restrain the language of the exception, as to sales by OTHER persons in *other* quantities. The prohibitions in the 3d and 18th sections have no reference to this question at all. (6.) The limitation which is sought by some to be put upon the exception under consideration, by a verbal criticism on the word "*is*," cannot obtain; for that is in effect a *concession* that the construction contended for by the plaintiff in error, is true as to all foreign liquor, imported into the country since July 4th. Thus making a senseless and useless distinction as to the time when foreign liquor was imported. (7.) The construction con-

tended for, by the plaintiff in error, is in no respect in conflict with that rule of construction of statutes which requires they should be read and interpreted in accordance with their true intent and meaning. Because, 1st. The intent and meaning of a statute is to be gathered from the language of the act itself, upon a full and fair reading of all its provisions in accordance with established rules of construction, (see authorities before cited.) 2d. To depart from the act itself, and grope in the wide field of conjecture, would lead to endless confusion. It would be impossible to discover any common intent on the part of the individual legislators. 3d. In seeking the intent from the act itself, we can gather no light from the title of the act. It is meaningless, and determines nothing on the question under discussion. Although indicative of a general purpose, it points to no particular means. It could be attached with equal propriety to a law suppressing gambling, horse racing, or the Mormon religion. And this liquor statute might with equal propriety, so far as the question of construction is concerned, be entitled "An act to promote the welfare of the people of the state of New York." For these reasons it is not allowable to resort to the title or preamble of a statute for interpretation. (1 *Kent*, 509, *lect.* 20.) 4th. In arriving at the intent and meaning of a statute, all the words of the act must be so construed as to give them *some effect.* (*Smith on Stat.* § 527. 7 *Barn. & Cress.* 569.) And consequently the language of the exception in the first section, is to have its full weight and force in ascertaining the general intent of the statute. 5th. So in construing a statute by the rule of looking at the old law, the mischief and the remedy, it is allowable to look outside the statute for the *mischief*, but the "*remedy*" must be ascertained from the body of the act itself. (*Smith on Stat.* § 530.) 6th. So the plain language of a statute is not to be rejected in construing laws, on the ground of its leading to an absurd conclusion, unless the absurdity be such as could not be attributed to any man in his *right senses.* (*Vattel's Law of Nations*, 245.) 7th. Applying these rules of construction to this statute, it is impossible to say, as some have pretended, that it was the clear intent of this

statute, that foreign as well as domestic liquors should be prohibited from sale as a beverage. It is clear from every section and provision of this statute, that it was not intended to wholly prohibit the use of intoxicating liquor as a beverage, or wholly to prevent the sale of it for that purpose. The act expressly authorizes every body who chooses, to *import*, to *manufacture*, to *buy* and to *use intoxicating* liquor, in any way he pleases, provided he does not keep it or sell it contrary to the act. It also authorizes many persons to sell it for many purposes; and intoxicating *cider* and intoxicating *pure wine*, made from grapes grown by the manufacturer, are authorized to be sold without limitation, to all persons, for all purposes. These are all exceptions to the general prohibitory provisions of the 1st section. No one denies that the legislature meant these exceptions, because it has said so. How then can it be said the law does not mean what it says, in the first exception as to foreign liquor? 8th. If the legislature had intended to limit the effect of this exception to sales by importers and liquor in the original packages, they could and would have said so. They knew how to express their meaning in the 7th and 22d sections. 9th. The language in the 7th section, in regard to the custom house receipts and marks on the casks and packages, corroborates the construction contended for by the plaintiff in error, because if it were intended that only the importer should sell in the imported package, then there would be little danger that he would fill his imported casks with an adulterated domestic article. On the contrary if it were understood that foreign liquor was not prohibited, then there was great good sense and reason in requiring the dealer to furnish other and further proofs than the custom house brands and certificates, that his liquor actually was imported. (8.) Another rule of construction of statutes, which is paramount to all others, and to which there is no exception, and which ought to be conclusive as to the construction of the statute in question is, that "penal statutes are to be construed strictly," and with "regard to the principles of the common law;" (*Kent's Com. 7th ed. p.* 514. *Smith on Stat. sec.* 468–748. *Savage, J.*, 7 *Cowen*, 253;) for it is not to be pre-

sumed that the legislature intended to make any innovation upon the common law, further than the language of the statutes absolutely requires. All laws in "*restraint of natural liberty*," those that forbid any thing "*not in itself unlawful*," or which "derogate in any other manner from the *general law*;" those which inflict "*penalties or punishments for crimes or offenses*;" such as "*work forfeitures*," derogate from the "*rights of property*," or work "*disability of persons*;" or such as impose restrictions upon "*trade, commerce or the common occupations of men*;" or which lay "*an excise or tax on thee itizen*"—are among those which are enumerated in the books as coming within the rule above stated, applicable to "penal statutes." (9) The act of April 9th, 1855, for the prevention of intemperance, &c. includes in its provisions, each and every of the foregoing elements and characteristics, which the law and the courts have always considered and treated as "odious." It is therefore a subject particularly requiring a stringent application of the rule of strict construction. The history of the law in this country and England abounds with instances where wise and patriotic judges, armed with this power of strict construction, have extracted the venom from tyrannical and oppressive laws enacted in times of excitement, the offspring of the ignorance an dpassions, and not of the judgment and consciences of men; and made such laws in some degree tolerable to the citizens. And so too in cases where the law contained but one or two "odious" features.

Having thus established, as we believe, that the plaintiff in error in this case has not been guilty of a violation of the statute by virtue of which he has been prosecuted to conviction and sentence, if the court should be against us upon that point, then our next proposition is that the statute itself cannot be upheld by the courts as a *law*. That in all its principles, provisions and features, it usurps and assumes to exercise powers inconsistent with the nature of republican and free government, and such as have uniformly been deemed tyrannical and characteristic of a despotism, and are not therefore within the scope and purview of the general grant of "*legislative power*," con

ferred by the constitution and the peeple upon the legislature; wherefore the statute is null and void. And further, that the statute in question, is, as it respects most of its provisions, in conflict with those clauses of the state and national constitutions, which have for their object the protection of the citizen in the enjoyment of his personal "*liberty*," "*security*," "*business*," "*rights*" and "*property*," "privileges and franchises," and therefore it is void and must be so declared by the courts.

I. It is clear that this statute, as regards the business and subject matter upon which it acts, is a statute for prohibition and restriction, and not one of regulation merely. The former excise laws were statutes of regulation merely; they left the whole traffic untouched in the main, not pretending even to *regulate*, only in respect to sales in quantities under five gallons, and in regard to those sales imposing but few restrictions as to persons, and none as to the *purposes* for which the liquor should be sold. On the contrary, the law of 1855 acts upon the whole traffic, (save only it has made particular exception where,) and seeks the certain destruction of the whole mass of property in this state, known as intoxicating liquor, save only the comparatively trivial quantity needed for *mechanical*, *medicinal* and *sacramental* purposes, and which form but a mere minimum. The statute provides that the liquor shall not be "sold or kept for sale or with intent to be sold, nor shall it be given away, nor shall it be kept or deposited in any place whatsoever. And all liquor kept in violation of these provisions is declared to be a nuisance and authorized to be seized and destroyed." The mere statement of its provisions shows the statute is intended to, and does, reach far beyond mere regulation of the traffic and the property.

II. The next proposition is that although the courts may, and frequently do, in pronouncing upon statutes, declare some portions of a statute unconstitutional and void, and uphold and sustain other portions thereof as good and valid; yet this is wher. the obnoxious provisions are—either as to the persons and things upon which they act—the objects and purposes they seek to accomplish—the principles upon which they are based, or the

particular remedies or modes of proceeding which they authorize—so separate, distinct and independent of the other valid provisions of the statute, that they can be expunged without materially affecting the other provisions. But where, as in the statute under consideration, it is one connected system or series of measures, having a single object and purpose, acting upon a particular class of persons and business, a specified kind of property, and where the bad (if any) is connected and blended with the good in the same sections and sentences, so that the bad cannot be separated without leaving the whole system impaired and so imperfect as to require legislation to give it any life or effect; then it is submitted the statute must stand or fall as a *whole.* (*Shaw, J., in Commonwealth* v. *Albro,* 1 *Gray's Mass. R.* 49.)

III. In this country the legislatures are not omnipotent or unlimited in their powers, even when not restrained by any constitutional restriction. They cannot pass *despotic* laws, or laws contrary to NATURAL RIGHTS and *justice*, even though there be no express constitutional inhibition. And if the legislature does so far depart from its legitimate purpose and authority, as to usurp such powers, the judiciary, which is a *co-ordinate branch of the government*, will declare its acts void. We grant (says Chief Justice Marshall,) that "the representatives of the people are the shepherds, to preserve the flock; but they are not exclusively such. If through inadvertence or design they should endeavor to sacrifice any one or more as *victims*, it cannot be done, so long as the *judiciary* remain virtuous, intelligent and *independent.* Both departments must *concur* to work iniquity before the people can be *made to mourn, and in bitterness to curse their government.*" (1.) The proposition that the legislatures of this country are limited in their powers, aside from, and independent of constitutional restriction, is deducible from the form and structure of the governments themselves, and the received and recognized political maxims and truths upon which the governments are based. (See preamble and resolution first, of the declaration of rights of the general congress of deputies at Philadelphia, 1774; Declaration of Inde-

pendence.) (2.) The proposition is further sustained by the fact that the colonial legislatures of this country from the first settlement of the country and organization of society here, were subordinate and limited in their action. They were not even possessed of the supreme legislative power. (See history of colonial governments, Massachusetts, Hartford and Connecticut and others.) (3.) The fundamental maxim of a free government, professing to derive all its powers from the consent of the governed, renders it impossible that the legislature should possess the power to pass unequal and unjust laws. For, inasmuch as the great end and object of all government and organized society is "protection to person and property," so no legislature or body of representatives can possibly be vested with authority to subvert the very ends and objects for which it was created. And so no legislative body can by any possibility be authorized or empowered to do that which the whole body of the people, when in a state of nature, would not be authorized to do; viz: to deprive any one person of his rights of liberty, property or the pursuit of happiness, provided he had not forfeited either of those rights, by criminal conduct or injury to others. (1 *Lieber's Political Ethics*, 188, 189, 194, 202. *Wooddeson's Lectures upon Law. Domat Civil Law. Vattel's Law of Nature and Nations, Book* 4, §§ 45, 51. *Works of John Locke, vol.* 5, *chap.* 11. *Opinions of Chase, J., in Caldar* v. *Bull*, 3 *Dallas*, 386. 6 *Cranch*, 87. 2 *Dallas*, 310. *University of Maryland* v. *Williams*, 9 *Gill & John.* 365. *Taylor* v. *Porter*, 4 *Hill.* 146. 18 *Wend.* 9. 2 *Peters*, 654. 1 *Baldwin*, 223. 4 *Barb.* 64.)

IV. In the enactment of the "prohibitory law" in question, the legislature has for the first time, in the history of legislation in this country, by a government acknowledging itself to be based upon the free principles before mentioned, assumed to usurp and exercise many of those despotic and arbitrary powers which cannot exist in them, consistently with the principles which have been shown to be the basis and foundation of our system of government. (1.) This statute, so far as it affects property in existence, at the time of its taking effect, directly

or indirectly, or interferes with the business of manufacture and sale of intoxicating liquor, is not *in any sense a law.* But is rather a legislative sentence or edict of destruction, resembling more an *imperial ukase* or despotic decree, than a legal constitutional statute, prescribing a "rule of action" for the future conduct of man. (2.) This is a law changing innocence into guilt. It punishes citizens for an innocent act, or rather for no act at all, and makes that to be criminal, which when done was in violation of no existing law. (*See* §§ 1, 4, 10, 16, 35, *of the statute.*) Up to 12 o'clock in the night of the 3d of July, it was perfectly lawful and innocent for the manufacturer, dealer and owner of liquor, to *sell* and *keep for sale*, and with *intent to be sold*, to give away, and keep to be given away and keep and deposit in any and all places whatsoever, all the liquors owned or possessed by him. Then come the provisions of this statute, which do instantaneously, by a simple legislative declaration, declare all such liquors forfeited, devote them to destruction, and mulct the owner thereof in severe penalties and forfeitures, when he has done no single act in regard to them, but has only *let them alone.* (3.) It compels a man to be a witness against himself, or if he refuses to testify, it assumes the truth of the criminal charge against him. And in one case destroys his property without any evidence whatever, and in another case deprives him of a substantial privilege and franchise belonging to citizens of this state. (*See* §§ 16 *and* 7.) (4.) It is a *retrospective* law with a *retroactive effect.* It destroys vested rights in private property, and violates the rights of lawful antecedent contract. (*Opinion of Chase, J., in* 3 *Dallas*, 386.) (5.) It seizes upon large amounts of property belonging to citizens, and *takes it.* If for public use it does so *without compensation;* if not for public use, then it is worse than taking the property of A. and giving it to B., for it destroys the property without benefit or use to any body. These powers have always been esteemed beyond the reach of legislative interference. (*See authorities before cited. Tracy, senator,* 18 *Wend.* 9.)

Having thus, as we believe, sufficiently maintained the pro-

position that this statute does at the outset, in its first enacting clause, usurp power and assume to do that which is not within the province of the legislature to do, and to which the general grant of the legislative power in the constitution does not extend; our next position is that this statute, both in its prohibitions and its penalties, is in conflict with the letter and spirit of those provisions of the state and national constitutions having for their object the protection of personal and property rights, and restraints upon state legislation.

I. The law divests the plaintiff in error and all other owners of liquor in this state of their vested rights in their property which they had at the time of the law taking effect, and is therefore in conflict with the provision of the constitution which provides that no citizen shall be deprived of his property without due process of law. (1.) That intoxicating liquor is property, hardly needs an argument to show. It has all the elements of property, and has been so considered for hundreds of years, and it is so determined by courts, and this statute in question, it will not be controverted. (2.) The prohibiting of the *sale* of this property, or the keeping of it for sale, is to the plaintiff in error, and all manufacturers and dealers in this article, depriving them of their vested rights therein, (*see* 1 *Leiber's Ethics*, 113, 114, 210, 211. *Reese's Encyclopædia*, *title property*. 2 *Kent's Com.* 7*th ed. p.* 377. 2 *Bouvier's Institutes*, 442.) The right of sale and disposition is one of the principal elements of the rights of property in an article. Aside from the exceptions, this act provides the liquor shall not be sold to *any* body by *any* body, or for any purpose whatsoever. It shall not have any *vendible quality* or *exchangeable value*. This is as much a deprivation of property as if the owner's possession was divested. But the denunciation does not stop with the prohibition of the sale. The act further provides that the liquor shall not be *kept for sale or given away*, or *kept to be given away*, or *kept at all*, (§ 1st;) so that although five minutes before 12 o'clock at night, July 3d, the liquor of the plaintiff in error was lawful property to keep and vend, five minutes after 12, the liquor was [illegible] property, it could neither be sold, given away *or kept*. It was

declared to be a nuisance, and courts were ordered to confiscate it, thieves were permitted to steal it, and violence to destroy it, without wrong and without redress; and, (4.) So far as the law affects property, owned at the time of its taking effect as a law, it does all this without any "process of law" whatever. This must be obvious to every mind. Whether the amount of intoxicating liquors held by dealers and manufacturers on the 3d of July last, was five million dollars worth, as some have contended, or fifty million dollars worth, which is more near the truth, the owners thereof, at the manufactories, warehouses, stores, groceries, taverns, bars and shops, had that amount of vested rights of property in that liquor. The moment sections 1st, 4th and 25th of this law, spoke by authority, those vested rights of property in those liquors, thus lawfully held, were *instantaneously destroyed*, and that before any "process of law" whatever could begin to be had; and as to such liquors thus made contraband and confiscate all that the "process of law" provided for by the statute could possibly effect, would be to find the liquor and execute the sentence or edict of confiscation which the law had *already pronounced*.

II. This law violates that provision of the constitution which declares private property shall not be taken for public use, without just compensation. (1.) This law takes the property. It claims to devote it to destruction, for the public good. If it is not for public use, then it may not be touched at all. But if taken at all it can only be on compensation paid. (2.) Destruction, or any diminution of private property, is as much a taking within this provision of the constitution as if kept for public use. (*Stevens* v. *Middlesex Canal*, 12 *Mass. Rep.* 466. 16 *Pick.* 431.)

III. This act, by several of its provisions, does in effect assume to declare and make all intoxicating liquors (save the exceptions) and the trade and traffic in them, a public nuisance. And indirectly it subverts and destroys the trade and business of manufacturing malt and distilled liquors in this state, with all the property, materials and labors incident thereto. Section 1st prohibits the business; section 4th makes it a misdemea-

or, and adjudges a forfeiture; section 6th provides for a process of search and seizure, and arrest of the suspected party, on probable suspicion. The 7th section prohibits a defense by a claimant without an oath of innocence. The 14th section packs the jury. The 10th section executes the legislative sentence of destruction. The 17th section reverses the rules of evidence, and presumes guilt instead of innocence. The 25th section declares the property to be a public nuisance. Thus is a trade and a business, and an article which by the common law of the country at the time of the adoption of our first constitution and immemorially before, was *not* a nuisance, but a legal and legitimate business and property, *declared and made* a nuisance, and destroyed by legislative *edict*, and this too when no change has taken place in the trade or the article, in any way altering *its character*, but only a change of opinion in the legislators. Thus are the life long habits and traditions of a whole people sought to be changed by force and violence in one night by a legislative *pronunciamento*, and which it is insisted is in conflict with those provisions of the state constitutions, which declare the "liberty" of the citizen shall not be taken away without "due process of law," and that no *member* of this state shall be disfranchised or deprived of any right or privilege, secured to any citizen, unless by the *law of the land*, and judgment of his peers. (1.) The term "law of the land" and "due process of law," do not mean the statute which works the forfeiture; for otherwise it would make the constitution read—no man shall be deprived of his property or liberty or franchise, without due process of law, *unless the legislature pass a law to do it.* This would be no limitation at all upon the legislative power. (4 *Hill*, 146. 3 *Story on the Constitution*, 661. 2 *Kent's Com.* 13. 2 *Coke's Institutes*, 50, 51.) (2.) Although the prohibitory law provides for a kind of process and trial, yet that is only to determine whether or not any accused person has or not kept or sold, and to find and destroy the article which the law had by its provisions made contraband. But so far as the divesting any right, which a citizen might before have had, below the business of selling, or any right of property which

he before had in liquor, which he does keep for sale or had on hand in his store for sale, on the morning of July 4th, it is clear the statute *itself*, by its own power, and without any process trial or proceeding whatever, divests and destroys these rights, (if any.) (3.) The constitutional provisions as to "liberty," "property" and "franchises" of a citizen, were taken from "magna charta," and the "bill," and "petition of rights" in England, and these, with the other kindred provisions in our constitution, constitute what in this country are the "bills" or "declarations of rights" of the citizen. They are the protections equally of *social*, *political* and *personal* liberty. They are to be largely and liberally expounded. In the language of the supreme court of the United States, (3 *Dallas*, 310,) "Not a particle of them should be shaken, not a pebble removed; in novation is dangerous, one encroachment leads to another," &c. (*See Story on the Constitution*, § 1865. 1 *Kent's Com. lect.* 24, *p.* 607.) (4.) These provisions of our constitution, when thus expounded, cannot be limited to the mere technical and verbal meaning of the words used. The "liberty" meant by the constitution, is not mere absence from imprisonment. The "privileges" and "franchises" spoken of, are not merely privileges to vote and hold office. But those provisions extend further; they include the freedom of the citizen in his actions and movements. They comprehend that right to the "pursuit of happiness," declared and asserted in our declaration of independence. They extend to protection of the citizen in his employments, in his freedom to earn a support by the ordinary and usual trades and business; the long recognized modes of industry in the country. (*See Coke's Commentaries upon Magna Charta*, 2 *Inst. ch.* 29, 47, 48.) (5.) There is much reason that these constitutional guaranties should extend to the business pursuits of men. It is quite as important that the trade and business which a man spends years to learn, and has made valuable to him by years of labor and experience, and the only business which he is qualified to follow, should be protected from despotic power, as that the property acquired by such business should be protected. Chief Justice Ruffin, in

4*th Devereux*, says: "He is deprived of an employment, the immediate source of his livelihood, the preparation for which has been the great business, it may be, of his life, to which he has served a long apprenticeship, and to which he has devoted himself, abandoning other lines of life which were once open to his free choice. True, he is free to work at other employments, but he is fit for none. He knows but this. He is in the situation of one bred to the agriculture of our country, to whom the legislature should say, 'Till the ground no more; go and spin silk or weave muslin.' His labor is not the subject of conscription; but he hangs a burden on himself, because the only employment to which he is competent is denied him." (6.) "The doctrine of this statute is, that the legislature may declare a property or business to be a nuisance, whenever a noxious or injurious use is made by others of the property, or the products of the business. This the legislature cannot do; if they may do so as to intoxicating liquor, they may do so as to all other business. It has been decided the legislature cannot be the sole judge of whether a purpose for which private property is taken, be or not, a '*public use*,' within the meaning of the constitution." (Tracy, in *Bloodgood* v. *The Mohawk and Hudson R. R.*, 18 *Wend.* 9.) So the legislature cannot by *declaring* a river to be navigable, *make* it so, and thus deprive riparian proprietors of their rights. (16 *Ohio Rep.* 540.)

IV. The law is also in conflict with the provision that no man shall be twice put in jeopardy of life or limb, &c., for the same offense. (Sec. 8.) It authorizes an appeal by and on the part of the prosecution upon a verdict of acquittal by a jury, whereby the acquittal may be reversed, and the defendant again tried for the same offense, and that too, without the complainant being required to give any security whatever. While the defendant's right of appeal is conditioned upon his giving excessive security, not only to pay and abide by the judgment rendered against him: but also to furnish sureties that he will not commit any other offenses under the act, and which sureties shall undertake to pay all fines that he may incur in other

cases. Thus rendering it next to impossible for a poor man to have an appeal.

V. The law deprives a defendant of right to a "trial by jury," and to be convicted, if at all, by "judgment of his peers." It is clear that the act may be so construed as to deprive the defendant of his election to give bail, and compel him to go to trial before the tribunal, created by section 5 of the act, and with a jury of *six only*, while the constitution secures to him a trial by twelve jurors, according to the common law. (*Opinion of Justice Parker, in People* v. *Kennedy*, 2 *Kern.* 138. *Opinion of Justice Dean, in People* v. *Johnson.*) But even if he may have his election, and thus secure a trial before a jury of twelve men, he is still deprived of trial by "*jury of his peers*," within the meaning of the constitution. The tribunal which the constitution secures to the accused, is a "jury," empanneled, drawn and constituted in accordance with the common law, and the statutes in force at the time the constitution was adopted. By this statute, the jurors to try accusations under that act, are packed by a new and arbitrary disqualification unknown to the common law, and not applicable to any other criminal trial or proceeding. If the legislature may exclude from the jury box a person qualified as a juror by the general law of the land, on mere suspicion and without any evidence at all that he has been, or is guilty of a like offense, with the person on trial; if they may make arbitrary disqualifications against particular persons or classes, in one case, they may do so in all, and might require the defendant to take his trial before the "Carson League." He is entitled to a trial by his "peers." (*See opinion of Pitman, J.*, 1 *Curtis Rep.* 335.)

VI. The law violates that provision of the constitution declaring that a man shall not be required to give evidence against himself. Section 12 compels a person arrested for intoxication to swear where he obtained his liquor; section 7 compels a man to swear to his innocence, before he can put the complainant upon proof of guilt, and section 16 gives an accused person the option of *declining* to criminate himself, and by so doing to

accomplish by his silence just what and only what he could do if he answered against himself.

VII. The act violates the provisions against demanding "excessive bail," "imposing excessive fines," and inflicting cruel and "*unusual* punishments," and so it establishes new and inferior courts with new jurisdictions in places other than cities, and which do not proceed according to the common law. (*Const. art.* 6, § 14.) This act also clothes officers and inferior and irresponsible magistrates with new and unusual powers. It vests the lowest grade of ministerial officers with arbitrary and dangerous powers, which can be exercised without let or hindrance, upon the mere discretion of the officers. By sections 5, 6, 13, 10, the inferior magistrates, named in the 5th section, are authorized to impose fines without limit, and forfeit and destroy property to any amount from $10 to a million, and to inflict long terms of imprisonment. All of which is contrary to the spirit and implied inhibitions contained in the 6th article of the constitution. And so section 12 of this statute forces upon constables and police officers the exercise of judicial and discretionary powers of arrest and interference with the persons and property of citizens, without warrant, complaint or process, to an extent unknown and unheard of ever before in a free country, and truly alarming in view of the tendency of all power to abuse. By this 12th section the officer is compelled to arrest all and every person whom *he* may determine to be engaged in violating the act, and to seize all property which *he may determine* is kept contrary to the act, and he may arrest and imprison every person whom he may determine to be intoxicated in any place whatsoever, whether guilty of any offense or not. And by the 14th section the officer is impliedly protected against the consequences of any malice, bad faith, or want of probable cause, which may have prompted his conduct. And by section 20, if the officer err on the side of mercy, he himself is subject to entire and irretrievable ruin.

It is insisted as another general proposition that this statute, in many of its provisions, is in conflict with those provisions in the bill of rights in the United States constitution, providing for the security of private rights, and which provisions are also

incorporated into the constitution of this state. (*See art. 5 of Amendments to the Constitution.*) But it also violates those provisions of the United States constitution, which are intended to protect the people from the annoyance of *spies*, and to secure their houses, persons and premises from unreasonable searches and seizures. And also those provisions of section 10 of the 1st article, which have for their object, to *restrain* state legislation from any undue interference with the powers conferred upon the national government, and from passing laws inconsistent with the nature of republican and free institutions.

I. The law is to all intents and purposes a "*bill of attainder*," which, as used in our constitution, includes "bills of pains," and "penalties." In England a bill of attainder, as technically understood, was such only as deprived of life. In our constitution it has a more extended signification, and all laws which assume of themselves to exercise judicial magistracy, either in the deprivation of life or confiscation of property, are bills of attainder. (*Fleicher* v. *Peck*, 6 *Cranch*, 87, 138. 2 *Cond. U. S Rep.* 322.) And so a bill of attainder, as thus defined, is not necessarily confined to individual victims. It may designate its objects by classes or by a general description, fitting a multitude of persons. In either mode it is equally liable to moral and constitutional censure. (1 *Dana*, 510.) The statute under consideration answers to the definition of a "bill of attainder" as above given. It confiscates property of individuals and classes without trial, judgment or hearing. The proceedings required, and provided for by the statute are (as has been before shown) in no sense a judicial proceeding to determine whether intoxicating liquors kept for sale, or kept at all, shall or not be forfeited. The judicial proceedings provided for by the act are themselves *but the result of a forfeiture* theretofore incurred, and a divestiture of title which had THERETOFORE TAKEN *place.* (1 *Dana*, 519. *Paley's Moral Philosophy.*)

II. This statute is an "ex post facto law," in a sense more odious if possible than any definition which has ever been given of that term. (1.) It is a statute making acts *criminal*, which in *their nature* are *not* criminal, and which for all time before

had been sanctioned by the common law and the statute. (2.) It not only makes acts criminal, which were not criminal, when done, but it declares a man a criminal for doing *no act at all*, (§§ 1, 4,) or an omission to do any act expressly required by the statute. A man is by this statute made a criminal *for letting his own property alone.* (3.) And so the statute requires less evidence to convict of doing an act, than was before required in like cases.

III. This statute "impairs the obligation of contracts." (*See Story on the Const.* §§ 1374 *to* 1399 *inclusive;* 1 *Kent's Com. 7th ed. p.* 455 *to* 466.) (1.) It has been held, in regard to this provision of the constitution, that the inhibition extends as well to contracts *executed* as executory contracts, and to preserve and secure *rights acquired*, as well as obligations assumed. (*Smith on Stat.* § 250.) (2.) Also it is said that although this provision of the constitution does not affect the power of the legislature to deal *with the remedies* for the enforcement of obligations or protection of the rights secured by the contract, yet if while pretending to deal with the remedy, it so legislates as in any degree to affect the *right* or impair the obligation, such legislation is void. (*Smith on Stat.* § 255. *Green* v. *Biddle*, 8 *Wheat.* 1. *Bronson* v. *Kinzie*, 1 *Howard*, 211.) (3.) And so it has been held that the laws in force where the contract was made, at the time it was made, enter into and become a part of the contract, as much as if they were expressly set forth in its stipulations. (*Smith on Stat.* § 258. *McCracken* v. *Hayward*, 2 *How.* 608. (4.) It has also been decided that this provision of the constitution prohibits the state legislatures passing any law, *divesting a vested right*, whether acquired under a contract between party and party or by a charter from government; and that the restriction as to vested rights extends to rights of every nature, arising or resulting from *contracts*, either *verbal* or *written, express or implied.* And so, whether the rights arise from the stipulation of the parties, or *accrue by the operation of the law, which is a part of the contract.* And that this restriction must be considered as *rendering void* any statute retrospective in its operation so far as it *affects vested rights*

(*Smith on Statutes*, §§ 261, 264. *Dartmouth College case*, 4 *Wheat.* 518. *Nelson* v. *Allen*, 1 *Yerger*, 366. *New Jersey* v. *Wilson*, 7 *Cranch*, 164. *Osborn* v. *Humphrey*, 7 *Day*, 335. *Atwater* v. *Woodbridge*, 6 *Conn.* 223. *Lewis* v. *Brackenridge*, 1 *Blackf.* 112.) It follows therefore: 1st. As to all intoxicating liquor in the hands of manufacturers and dealers at the time of the prohibitory act going into effect, and which had been manufactured or purchased by them for sale again—they had a *vested right* to re-sell the article, which right arose both by contract and by operation of law. 1. By express contract: for when a dealer in any kind of property purchases of another an article or quantity of the property in which he traffics, he contracts and bargains for all the rights and incidents which attach to the property while owned by the vender. And the vender is considered in law to have expressly granted and conveyed to his vendee those rights and incidents. The most important of which, and indeed the only one of any use and value whatever to a vender thus circumstanced, is the *right of re-sale*. 2. Such rights of re-sale attached to the property as an inseparable incident when purchased by the dealer by *operation of law*. The law as it then was gave to the dealer the absolute right to use, keep and *sell*. That law became a part of *the contract*, and vested the right thus acquired in the dealer. And that right of sale so vested, the "higher law" of the constitution secures and protects, inviolable from state interference. It is a right acquired by contract, the obligation of which is to respect and sustain the right, and the state law that touches either is void.

In conclusion, as to this statute, it is submitted that the act for the prevention of intemperance, pauperism and crime, while it proposes to attain and accomplish a good and a worthy object, does, nevertheless, manifest a *determined purpose* in the pursuit of that object, if necessary, to violate the fundamental guarantees of civil liberty, subvert the constitution and usurp despotic power. When it is met by constitutional barriers, it seeks to avoid them by a series of transparent evasions. Pretending to respect property, it *destroys* it *indirectly*, by depriving it of all its incidents and uses; pretending to respect liberty and per-

sonal security, it proscribes a large class of citizens, and places their rights of person and property, entirely at the mercy of any man in the community, who from good or bad motives may choose to destroy them. It claims the right, and usurps the power to do all manner of evil in order "that good may come." The entire scheme of measures proposed by the law are vicious, and should not be upheld by the courts.

*A. Sawin*, (district attorney,) for the defendants in error. The only question presented by the bill of exceptions, (apart from matters of form,) involving the validity or construction of the prohibitory liquor law, is that presented by the rejection of the proof offered by the defendant, and rejected by the court below, "that the liquor sold by the defendant was liquor imported into this state from foreign countries, under and in pursuance of the revenue laws of the United States; that the defendant purchased such liquor from the importer in the imported packages, and that the same was *drawn* from such packages, and sold to the persons and at the times proved by the witnesses for the people." All the counts in the indictment are for illegal *sales* in quantities less than one pint, and not for giving away or keeping with intent to sell. The proof showed the liquor was sold at the defendant's bar in quantities less than one pint, and was drank on his premises. The 1st section of the act for the "prevention of intemperance, pauperism and crime," enacts substantially that intoxicating liquor shall not be sold, except as thereinafter provided for medical purposes. The 22d section declares all distilled liquors (and of course brandy) to be intoxicating. The first section also excepts "*liquor the right to sell which, in this state, is given by any law or treaty of the United States.*" There is no pretense that the brandy in question was sold by the defendant under the provisions of the second section.

*First.* There is no law or treaty of the United States giving the right to the *importer* of liquors, or any other person, to sell the same in the original package or otherwise, in this state. I. It is admitted there is no treaty or law of congress, in *ex-*

*press words*, authorizing the importer of brandy or distilled spirits or wine, upon payment of duties under the revenue laws of the United States, to sell the same. The acts of congress bearing on the question are as follows: The first act of regulation of imports, passed March 2, 1799. (1 *U. S. Stat. at Large*, *p.* 701, § 103,) prohibits the importation of distilled spirits in less quantities than ninety gallons. By act of 2d March, 1829, and act of 27th February, 1830, which are now in force, brandy may be imported in casks of a capacity of not less than fifteen gallons. The last tariff act, passed 30th July, 1846, (9 *Stat. at Large*, *schedule A*, *p.* 44,) imposes a duty upon brandy of one hundred *per centum*, *ad valorem*.

II. The constitution of the United States and laws of congress authorizing the importation from foreign countries of distilled spirits and imposing duties thereon, do not, *by implication*, give the right of sale of the same in this state to the importer or any body else. (1.) There has been no adjudication of the supreme court of the United States to that effect. The case of *Brown* v. *The State of Maryland*, (12 *Wheat.* 419,) decided in 1827, arose under a state law prohibiting importers from selling "*without taking out a license for which they shall pay fifty dollars*," and Chief Justice Marshall held the act repugnant to that clause in the constitution, which declares "that no state shall lay any imposts, or duties on imports or exports." The question was one of taxation. Afterwards, in 1847, the supreme court of the United States held that the laws of New Hampshire, Massachusetts and Rhode Island, regulating the sale of intoxicating liquors, were not inconsistent with the federal constitution or acts of congress under it; and in doing so, all the judges expressly held one important portion of the opinion of Chief Justice Marshall in the above case to be *obiter*, and three of them, Justices Daniel, Woodbury and Grier, substantially adjudged that so much of Chief Justice Marshall's opinion in the case of *Brown* v. *Maryland*, as held that the state governments could not prohibit sales by the importer in the original packages, to be "not the point settled or the *substantial reason* for it." (*See* 5 *Howard*, 505 *to* 633.) "It is clear," says

Chief Justice Taney, (*Id.* 574,) "that the power of congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several states; and beyond those limits the states have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. *Every state therefore may regulate its own internal traffic, according to its own judgment, and upon its own views of the interest and well being of its citizens.*"

III. But even if congress possess the right under their power to regulate commerce, to authorize the importer of foreign liquors to sell the same in this state, *that power has not been exercised*, and therefore, according to the unanimous opinion of the justices of the supreme court of the United States, in the above cited New Hampshire case, the legislation in this state is valid. It follows, therefore, that no construction can be given to the excepting clause under consideration, that would render the proof offered material; in other words, there is no liquor "the right to sell which in this state is given," either in express terms or by implication, by any law or treaty of the United States. The court will probably see from the examination of the other points presented below, that the decision of the first proposition is of no *practical* consequence in this case, yet it is peculiarly fit that the bar and the courts should upon all proper occasions, when satisfied the precise question presented by the first point is yet open for argument and discussion in the supreme court of the United States, maintain the right of every state "to regulate its own *internal* traffic according to its own judgment, and upon its own views, of the interest and well being of its citizens."

*Second.* Assuming, however, (as the legislature undoubtedly did,) that the federal judiciary have given such a construction to the law of congress as authorizes the importer of brandy to sell it within this state in the original cask or package, (not less than fifteen gallons,) then the brandy charged in the indictment and proven to have been sold by the defendant, at his bar, in quantities less than one pint, and drank on his premises, *is not*

*the* "*liquor*" named in the last clause of said first section, within the intent and meaning of the exception.

I. Construing the clause by itself, adopting the most stringent rule of subtle and strict construction, ("the letter that killeth instead of the spirit that maketh alive,") it is submitted—(1.) The words "*is* given"—the present tense, clearly limit the operation of the exception, as the technical words in an indictment "then and there" do—to the specific liquor charged in the indictment. (2.) The words "is *given*," mean, "is granted in *express terms*." (3.) The words "liquor the right to sell which is given by," are *equivalent* to the following words, "the sales of liquor authorized by." (4.) There is no pretense under any construction by the supreme court of the United States, or any judge thereof, of any act of congress, that the right to sell liquor is attached to or flows with the liquor. "The right to sell which," is a right not "given" to the *liquor* but to the *person*.

II. But if there is any doubt as to the meaning of the excepting clause, such a construction should be given to it as will put in force the intent of the lawmakers, which can be done only by limiting it to sales of liquor in the original packages by the importer. This can be done in the application of well settled rules for the construction of statutes, *without adding to or taking from the whole act a single word, and at the same time give weight and meaning to every word therein.* But it has been argued that penal statutes should be construed so strictly, as that the intent of the legislature should not be diligently sought out. This pestilent dogma has no foundation in principle and is not sustained by authority. "However true it may in the general be, that penal laws are to be construed strictly, yet, even in the construction of them the intention of the legislators ought to be regarded." (*Bacon's Abr. tit. Statute; cases, Rex* v. *Hodnet*, 1 *Durnf. & East*, 96; *Heydon's case*, 3 *Rep.* 7; 8 *Mod.* 65; 2 *Atkins*, 205.) The statute declared it to be treason for a servant to kill his *master*. The court held, that applied to his master's *wife*. Croke, J., saying, "Notwithstanding that a statute which increases a punishment beyond what it was at the common law, ought not to be extended by an *equi-*

*table* construction, yet the words of such statute ought to be construed *according to the intention* of the makers of the statute. So in the soldier's case, (*Cro. Car.* 71.) The statute making the departure of a soldier from his *captain* without license, felony, it was held by nine judges against three that a departure of the soldier from his *conductor*, was within the meaning of the act. That a penal statute when made for the public service and good of the king and realm, ought to be construed according to the intention of the makers of the statute. So in *Poulter's case*, (11 *Rep.* 34, 35,) it is said, "There are many cases in our books where penal statutes have been construed by *intendment* for the suppression of a mischief," &c. Spencer, justice, in delivering the opinion of the court in the case of *Sickles* v. *Sharp* (13 *John.* 497,) says: "The rule that penal statutes are to be construed strictly when they act on the offender, and inflict a penalty, admits of some qualification. In the construction of statutes of this description, it has often been held that the plain and manifest intention of the legislature ought to be regarded. A statute which is penal to some persons, provided it is beneficial generally, may be equitably construed. Even in case of felony, the courts have regarded the intention of the legislature." A statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction. (2 *Bro.* 110, 111, 116.) "Yet penal statutes are taken strictly and literally, only in the point of defining and setting down the *fact* and *punishment*, not in words that are but circumstances and conveyance in the putting of the case. (*Bacon's Maxims*, 51, 58, 59.) Chief Justice Marshall says, "Although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature." (5 *Wheat.* 76.) Woodworth, justice, in delivering the opinion of the court, in the case of *The People* v. *Bartow*, (6 *Cowen.* 293,) says, "Although a penal statute is to be construed strictly, the courts are not to disregard the plain intent of the legislature. Among other things it is well settled, that a statute which is made for the good of the public ought, although it be penal, to receive an equitable construction. When it is considered that

this statute [the restraining act] was intended to strike at an existing evil, deemed to be of serious injury to the community, it cannot well be doubted that its enactment was to promote the public good." Justice Story, in 1 *Gallison's Rep.* 118, says: "We are obviously bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by *strained* inferences. On the other hand we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and *mischief* to be within the *remedial* influences of the statute; and this is what I understand by expounding a statute liberally as to the offense." Again in 3 *Sumner*, 211, says the same judge in reference to penal statutes, "The proper course is to search out and follow the intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and object of the legislature." Justice Woodbury, (2 *N. Hamp. Rep.* 195,) says: "A statute, if of public utility, as the uniform presumption, should be so construed as to effectuate the intent of the makers. The intention, to be sure, is to be gathered from the language and *subject matter* of the statute. But when once so gathered, it is no less important to society, and no more severe upon the offender to enforce it in penal statutes than in remedial ones. Without such a construction, too, this class of statutes become almost a dead letter, prosecutions are a mockery, and malefactors encouraged." Chief Justice Parsons, in 8 *Pick.* 370, says, (in relation to this rule that penal statutes must be strictly construed,) "This did not exclude the application of *common sense* to terms made use of in the act, in order to avoid an absurdity which the legislature ought not to have been presumed to have intended. There were cases which showed this, *although precedents were not required* to sustain so reasonable a doctrine." (*See* 15 *Wend.* 147.) A penal statute may also be a remedial law penal in one part and remedial in another. (1 *Wilson*, 126. *Douglass*, 702.)

The foregoing citations furnish precedents (if any were necessary) for the application of the good old rules for the con-

struction of *all* statutes, to the act for the suppression of intemperance, though it be called a penal statute. (1.) The rule in *Heyden's case.* "What was the state of the law before the act?" The law of the state granted licenses to sell intoxicating liquors in small quantities; and it was supposed the United States laws granted the right to sell in large quantities. "What was the *mischief* against which the former law did not provide?" The general use, especially in public places, of ardent spirits as a beverage. "What remedy has the legislature provided by this act to cure the defect?" The abolition of licenses for the sale of ardent spirits, and the prohibition of the use of intoxicating liquors as a beverage. "What was the true reason for the remedy?" The "intemperance, pauperism and crime," resulting from its use. (2.) See rule in *Plowden*, 565. "A saving clause in a statute is to be rejected when it is directly repugnant to the purview or body of the act, and could not stand without *rendering the act inconsistent with, and destructive of itself.*" (*See* 15 *Pet.* 445; 1 *Kent*, 463; 20 *Maine R.* 360.) (3.) The rule that the intention of the lawgiver and the meaning of the law are to be ascertained by viewing the *whole and every part of the act.* (*See Broom's Legal Maxims*, 448, *and opinion there cited, by Justice Coleridge.*) Putting the 1st and 22d and 4th sections of this act together, then, the plain reading, "whoever shall sell intoxicating liquor except liquor in original packages, the right to sell which is given by law or treaty of the United States to the importer thereof, shall be guilty of a misdemeanor." (4.) The rule, that all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the *fitness of the matter and person.* (*Bacon's Maxims, Reg.* 10. *Broom's Max.* 601, 140, 439.)

This act is not, so far as it bears on the case at bar, a penal statute within the meaning of the rule construing penal statutes strictly. It created no new offense, and imposed no new punishment. (1.) The selling of intoxicating liquors in this state, England and all civilized countries, has been for centuries the subject of penal legislation. (2.) Instead of increasing the

punishment for unlawful sales, it diminished it—(provided our old excise laws are repealed by it.) Under the revised statutes, the overseers of the poor recovered from the seller, $25 for each sale under five gallons. In addition, for the same sale, the party was subject to an indictment; the punishment of which was both fine to the amount of $250, and imprisonment for one year in the county jail.

*Third.* But assuming the penal provisions of the act under consideration, relate exclusively to home made liquors, then the indictment, conviction and judgment can be sustained under the provisions of the revised statutes; these provisions not being in terms repealed, and not by implication, because they are not "inconsistent with this act" so far as they relate to the case at bar. (1.) The 15th and 16th sections of the excise act (1 *R. S.* 681) prohibit sales in quantities less than five gallons, and the 25th section makes such sales, (without license,) misdemeanors. (2.) The 25th section of the present act prohibits the granting of licenses, leaving the prohibition of sales in quantities less than five gallons in full force. (5 *Denio*, 70, 112. 3 *Barb. S. C. Rep.* 548,) (3.) Implied repeals are not favored by the law. (*Broom's Legal Maxims*, 24 *to* 27, *and cases there cited.*) But to conclude on this branch of the case, inasmuch as no one doubts the *actual intention* of the legislature to have been to place additional restraints upon the sale and use of *all* imported as well as domestic intoxicating drinks—and assuming that the importer of foreign liquors has been authorized by act of congress to sell the same in the same quantities as imported, (without which assumption there is no subject matter for the exception to operate upon,) it is respectfully submitted, this court will by "restraining," in the language of Bacon, the "general" term "liquor" to "the fitness of the matter and the person"—the original package and the importer, permit this praiseworthy enactment "to suppress intemperance, pauperism and crime," to effectuate the intent of its makers.

*Fourth* None of the provisions of the "act for the prevention of intemperance, pauperism and crime," *applicable to this case*—the retail sale of intoxicating liquors—and this proceed-

ing, by indictment, (whatever opinion may be formed of the validity of the search and seizure clause,) are in conflict with the constitution of the United States, or of this state, and therefore, were the allegations of the sellers of intoxicating liquor true, that those constitutional provisions are arbitrary and despotic, and consequently in conflict with natural justice—this court nevertheless will affirm the judgment in this case, and the validity of such provisions of the statute, because *judges* in the exercise of judicial power cannot recognize any higher law than the constitution of this state and of the United States.

As to the other points presented in the bill of exceptions.

*Fifth.* The proceedings relative to the alleged irregularity in the organization of the grand jury, are improperly incorporated in the bill of exceptions, and therefore cannot be made a ground of error in this form. (2 *R. S.* 736, §§ 21 *to* 26. 21 *Wend.* 509. 4 *Denio*, 9, 133.) The remedy, if any exists, is by *mandamus.* (20 *Wend.* 108.) Again; the motion to quash was made after pleading to the indictment. It was then too late; at any rate it then became a matter of discretion. (*Barbour's Crim. Law*, 348, 9.) Besides, the court having ascertained the absence of grand jurors, in other words excused them, properly exercised the power of ordering the four talesmen to be summoned.

*Sixth.* No error can be assigned upon the proceedings of the court below upon the challenge to the array. (1.) The court having been constituted triors of the challenge, by consent of the defendants, no exceptions can be taken to their proceeding, upon the facts. (2.) There being various unconnected allegations of facts set forth in the challenge, one portion material and furnishing good causes of challenge to the array, as those relating to the absence of the sheriff and county judge at the time of the drawing, and others entirely immaterial, as the mode of summoning, &c., and there being no pretense of proof that the drawing was irregularly conducted, the finding of the court of sessions is in accordance with the proof.

*By the Court*, GREENE, J. All of the exceptions taken by the defendant to the rulings of the court below, on the motion to quash the indictment for irregularity, and on the trial of the issue joined on the challenge to the array, are improperly incorporated in the bill of exceptions. Bills of exceptions in criminal cases were unknown to the common law. The right to a bill of exceptions in such a case is given by statute. Its office is to bring up for review questions of law made and decided on the trial. But the statute which gives the right, limits it to exceptions taken on the trial of the *main issue*. It is not extended to such as are taken on the trial of preliminary or collateral questions. (2 *R. S.* 736, § 21. *Freeman* v. *The People*. 4 *Denio*, 21, *per Beardsley, J.*) It will therefore be unnecessary to examine the various questions raised by those exceptions, as our conclusion on them either way could not affect the result. The same answer must be given to many of the questions suggested by the exceptions taken on the trial of the main issue, and discussed on the argument. *The facts proved* on the trial do not raise the questions, and any opinion which we might express upon them would be the mere result of gratuitous speculation upon questions in which the defendant has no legal interest.

The indictment was for selling brandy (not being liquor, the sale of which was authorized by th laws of the United States) to persons not authorized to sell liq by the act under which the indictment was found. The prosecution proved several sales by the defendant of brandy, at his bar, in quantities less than one pint, which liquor was drank on his premises. The defendant offered to prove that the brandy sold by him was imported from foreign countries, under the revenue laws of the United States; that the duties had been paid thereon; that he purchased it from the importer in the packages in which it was imported; and that it was drawn from those packages and sold by him as proved on the trial. The evidence was rejected as immaterial, and the defendant excepted. He also offered to prove that the liquor in question was owned by him on and be-

fore the 3d day of July, 1855. This evidence was rejected, on the same ground, and the defendant excepted.

Two questions of law arise on these facts and exceptions: 1st. What is the extent of the prohibition *upon the sale of liquor*, contained in the first section of the act as it is qualified by the second and other sections? and 2d. Is *that prohibition* a valid legislative act?

That part of the first section that bears upon these questions is in these words: "Intoxicating liquor, except as hereinafter provided, shall not be sold * * * by any person for himself or any other person in any place whatsoever." Then follow divers provisions prohibiting the giving away or keeping such liquor except in certain specified places, which provisions, as they have no bearing upon the questions above stated, require no examination. The last clause of the section is in these words: "*This section shall not apply to liquor* the right to sell which is given by any law or treaty of the United States." The second section provides that certain persons, on complying with its provisions, "may keep for sale and may sell intoxicating liquor and alcohol for mechanical, chemical or medicinal purposes, or wine for sacramental use." The twenty-second section contains several provisions in relation to the construction of the act, and among others a provision that nothing in the act shall be construed so as to prevent "the importer of foreign liquors from keeping or selling the same in the original packages to any person authorized by the act to sell such liquors." These provisions embody all the prohibitions and exceptions material to the questions under consideration, contained in this act.

It will be observed that this act contains no provision excepting any liquor *specifically* from the operation of the prohibitory clause. The exception in the first section relates to "liquor the right to sell which is given by any law or treaty of the United States." No law or treaty of the United States has been cited, and I am not aware that any exists, expressly giving the right to sell any *specific* liquor. But there are divers laws and treaties providing and stipulating for the admission of foreign liquors into the United States upon certain terms pre-

scribed by such laws and treaties. These laws and treaties were enacted and entered into in pursuance of the power conferred upon congress by the constitution of the United States "to regulate commerce with foreign nations and among the several states, and with the indian tribes." (Art. 1, § 8.) In the case of *Brown* v. *The State of Maryland*, (12 *Wheat.* 419,) it was held by the supreme court of the United States that an act of that state requiring importers to take out a license to sell imported merchandise, was repugnant to the provisions of the constitution of the United States, prohibiting the states from laying duties upon imports. Chief Justice Marshall in the same case held that an importer of foreign merchandise who had imported the same under the revenue laws of the United States acquired a right under such laws to sell the imported article in the *state* and *condition* in which it was imported; that the law of Maryland was a regulation of foreign commerce, and as such was in conflict with the revenue laws of the United States. Justice Thompson dissented from the positions taken by the chief justice, and insisted upon the right of the state to levy the license tax as a legitimate exercise both of its power of taxation and its power to regulate its own internal trade; holding that the importer acquired no right under the laws of the United States to sell the imported article, independent of state regulation. In the cases of *Pierce* v. *The State of New Hampshire; Thurlow* v. *The State of Massachusetts*, and *Fletcher* v. *The State of Rhode Island*, commonly known as the license cases, (5 *How. S. C. R.*) the question as to the right of the states to regulate and prohibit the sale of liquors, the importation of which was authorized by the laws of the United States, was brought before the same court. The statute of Massachusetts under which one of the cases originated, made it unlawful for any person to sell intoxicating liquor without a license, in quantities less than twenty-eight gallons. The law also contained an express provision that the selectmen in whom the power to grant licenses was vested, should not be *compelled to grant any licenses.* The statute of New Hampshire prohibited the sale of liquor in that state in

*any quantity*, without a license. The law of Rhode Island contained provisions similar to those contained in the law of Massachusetts. The defendants were indicted and convicted in the state courts, for violations of these laws, and the judgments being affirmed by the supreme courts of the states respectively, were carried by writs of error to the supreme court of the United States. In that court it was contended on the authority of *Brown* v. *Maryland*, that the laws of Massachusetts and Rhode Island were void, on the ground that the laws of the United States authorized the importation of the liquor sold by the defendants in those cases, (which liquor had been actually imported,) and that the state laws were in conflict with those of the United States. The liquor sold by the defendant, in the New Hampshire case, was imported from Massachusetts, and it was contended that the law of that state was repugnant to the provision of the constitution authorizing congress to regulate commerce among the states.

But the court held that the laws of the states must be construed as applying exclusively to the *domestic* trade in liquor; that they had no application to imported liquor in the hands of the importer; that they did not interfere with his right to sell in the original packages, as laid down in *Brown* v *Maryland*, and were not, for that reason, in conflict with the laws of the United States under which the liquor was imported. In the New Hampshire case it was held that the state law was a regulation of commerce "among the states" within the meaning of the constitution and so within the power of congress. But the law was sustained on the ground that the powers of congress and the state legislature were concurrent, and that, as congress had passed no law regulating commerce among the states, the state law was valid until congress passed some law conflicting with the provisions of the state law. Chief Justice Taney in these cases reiterated the doctrine laid down by Chief Justice Marshall in *Brown* v. *Maryland*, and held that the right to sell imported liquor, derived from the United States, was confined to the importer and to liquor in the casks or packages in which it was imported, and that when it passed from his

hands it ceased to be *an import*, and became subject to state regulation. It will be remembered that the law of Massachusetts prohibited sales in less quanties than twenty-eight gallons, and that the law of congress authorized the importation of the *same liquor* in quantities of fifteen gallons; and that the law could be sustained upon no other ground than that assumed by the chief justice, consistently with the rule asserted by the majority of the court, in *Brown* v. *Maryland*. In the license cases Justices Daniel, Woodbury and Grier dissented from the doctrine laid down by the chief justice and by Chief Justice Marshall in *Brown* v. *Maryland*, asserting the right of the importer, under the laws of the United States, to sell imported merchandise, uncontrolled by state regulation. The soundness of this rule was questioned by those learned justices, and *Brown* v. *Maryland* was not regarded as an *authority* for the rule. The question was not directly involved in either case, and it may be doubted whether it is not still open to discussion, upon principle. But it will be perceived that the right to sell imported liquor, given by the laws of the United States, under the broadest rule laid down by the majority of the court in the cases cited, is subject to two important qualifications. 1st. That it remains in the hands of the importer, and 2d, that it shall be sold in the condition in which its importation is authorized, and that all sales by *other persons or in any other quantity or condition* than that in which it is imported, are subject, like the sales of all other property, to such regulations as may be prescribed by state laws.

The question then arises as to the true construction of the exception contained in the first section of the prohibitory act. The plaintiff in error contends that it extends to all *liquor in specie*, the right to sell which, under *any circumstances*, is given by the laws of the United States. The repugnancy of this construction to the entire policy of the act as manifested by all of its provisions is too plain to escape observation, and if the language of the exception will fairly admit of two constructions it should receive that which will best harmonize all the provisions of the act. The object of this clause, whatever

the effect of its construction may be, is rendered plain by a reference to the subject matter to which it relates. It was assumed by the legislature that a right to sell certain liquor was given by the laws of the United States. We have seen that this right, considered in its utmost extent as defined by the court whose province it is to give a construction to those laws, is neither general as to persons nor in its application to the property to which the laws in question relate. The right on the contrary is limited to *certain persons*, and qualified by the *status of the property*. While it is in the hands of the importer, and in the condition in which it was imported, the laws under which he has imported it, give *him* a right to sell it in that condition. This is the extent of the right. When he parts with the property, or changes its condition, his right and *all right* to sell it, derived from those laws, ceases. It is no longer the right to sell which is given by the laws of the United States. The object of this exception in the first section clearly was, by preserving the rights secured by the laws of the United States, to avoid collision with those laws, and the general exception of *certain liquor in specie*, from the operation of the first section, which is claimed from a literal reading of the clause in question, should be controlled by the limitations as to persons and the qualifications as to the *status* of the property, which are annexed to the right of sale given by the laws of the United States, so that the provisions of the first section will not apply to imported liquor still in the hands of the importer and in the casks, bottles or packages in which it was imported. The propriety of this construction is rendered plain by a reference to the language of the 22d section, already quoted. This clause, whatever its purpose, or however unnecessarily inserted, may be resorted to on this question of construction, as evidence of the intention of the legislature. The 2d section, as we have seen, provided that certain persons, on the conditions therein prescribed, might sell liquor for certain purposes. Importers were not mentioned in this section, nor was it necessary under any construction of section 1st, according to the rule laid down in the license cases, that importers should be mentioned in sec-

tion 2, but the legislature, apparently as a matter of precaution, inserted the clause last cited, in the 22d section. It refers to the same subject matter as the last clause of section 1st, and may properly be read in connection with it, and when these two clauses are read together in the light of all the provisions of the act, I think the true construction of the first section is reasonably plain. It follows that the liquor sold by the defendant was not exempted from the operation of that section. The evidence offered by him to prove that it had been imported was therefore immaterial, and was properly rejected. The only remaining question is as to the validity of the prohibition.

It is claimed by the defendant that the prohibition is repugnant to the provisions of the 6th section of the first article of the constitution, and therefore void. That part of the section in question to which the prohibition is supposed to be repugnant is in these words: "No person * * * shall be *deprived* of life, liberty, or *property*, without due process of law; nor shall private property be taken for public use without just compensation." I do not understand that it is claimed that this provision of the act violates the prohibition contained in the last clause of that part of the section above quoted. It certainly cannot be maintained that this part of the act provides for the *taking* of property, in any sense of the term. But it is claimed that this prohibition of the sale of liquor does in *effect deprive* the owner of his property in it. The argument is that the right to sell and traffic in property is incidental to and inseparable from the title; that such right is one of the chief elements of its value, and that a law prohibiting the exercise of this right virtually deprives the owner of his property. That liquor is property, that the right to sell property is one of its recognized legal incidents, and that "due process of law" which the constitution prescribes as the only condition upon which the owner of property can be deprived of it, means a trial and judgment in a regular judicial proceeding, are propositions too well established to admit of argument, or require the support of authority. But that the right to sell and use property at the will of the owner is absolute and subject to no restraint, cannot be maintained,

and will hardly be asserted. The rights and interests of individuals are, to some extent at least, subordinate to those of the public, and must yield to them, in cases of conflict. It is the acknowledged province of legislation to prescribe by law such rules concerning the title to property and its sale and use as will, in the judgment of the legislature, most effectually secure to the owner the enjoyment of these rights, on the one hand, and on the other protect the public from injuries that may result from the exercise of them. This power, however, is subject to the restraints imposed by the constitution through which, in this state, the legislature derives its powers. We have then only to compare the provision heretofore cited, of the first section of the prohibitory act, with the above provision of the constitution, and from such comparison to determine whether there is any conflict between the law and the constitution. The provision of the first section as qualified by the second section, so far as the sale of liquor is concerned, is in substance that intoxicating liquor, except for mechanical, chemical or medicinal purposes, shall not be sold, &c. The provision of the constitution is, that no man shall be deprived of his property without due process of law. The question is, does this prohibition *deprive* the owner of liquor of that property? It does not deprive him of the possession or use of it; but while it remains in the state, subject to the law, it undoubtedly diminishes its value; and hence it is argued that the owner is to that extent virtually deprived of it. Substantially the same prohibition as that contained in our present constitution, has existed in all our constitutions since the organization of the state government; and under each of these constitutions laws were passed imposing restraints, to a greater or less extent, upon the sale of liquor. The validity of those laws has never, to my knowledge, been questioned. But the difference, it is urged, between those laws and the present law is, that those laws merely *regulated*, while this *prohibits* such sale. It remains to be seen whether there is any difference in principle between the two cases when they are regarded with reference to the objection now under consideration. The only cases cited in which this question has been

considered by this court, are those of *The People* v. *Berberrich*, and *The People* v. *Toynbee*, decided at a general term in the second district, by Justices Brown, Strong and Rockwell.(*a*) A prosecution was commenced in each case before a magistrate, upon a charge of selling, and having with intent to sell, intoxicating liquor. Both defendants were convicted, and in *Toynbee's case* a fine was imposed pursuant to the statute, and a judgment of forfeiture, directing the destruction of the liquor, was rendered, from which judgment the defendant appealed to this court. *Berberrich's case* was removed by certiorari before sentence. An objection was taken before the magistrate in *Toynbee's case* to the sufficiency of the complaint, and also to the jurisdiction of the magistrate to proceed to try the case after the defendant had offered to give bail to answer to an indictment; and, as I understand the opinion of Justice Brown, the last objection was taken in *Berberrich's case*. Justice Strong held both the objections good, and my recollection of Justice Rockwell's opinion (which I have not now before me) is, that he concurred with Justice Strong as to the validity of the above objections, and concurred in the judgment *on that ground alone*. Justice Brown held that the last objection was not well taken, but held that the first section of the law, so far as it prohibits the sale of liquor, the sections or provisions which provide for its seizure and destruction, and several other provisions under which (as I understand the facts from the several opinions) no questions were raised in the cases, were unconstitutional. Justice Strong concurred in this opinion as to the unconstitutionality of the prohibitory clause of the first section, and the judgments were reversed. Both of the learned justices placed their opinions upon the ground that the prohibition of the sale of liquor was *virtually* depriving the owner of his property in it. Justice Strong says: "The protection of any species of property must necessarily extend to its essential and definitive characteristics, *especially those which constitute its main value.* * * * One of the essential characteristics of property is its vendibleness, especially for the principal use to which it can be appro-

(*a*) Reported ante, pp. 168, 224.

priated. * * * That the manner of selling it may be *regulated*, so long as the *right is essentially preserved*, there can be no doubt. * * * Upon the whole, my conclusion is, that the right of property extends not only to its *corpus*, *but to its ordinary and essential characteristics*, of which the right of sale is one, and that it can be controlled *only so far as to prevent abuse*, without destroying such characteristics." The learned justice, speaking of our former excise laws, thus states the difference between the present statute and those laws: "They were, however, by no means *prohibitory of the right;* every man was at liberty to sell in quantities exceeding five gallons, and a *selected class*, in any quantity." In conclusion, the learned justice says: "I consider the statute in question as *mainly prohibiting* the sale of intoxicating liquor as a beverage, and destructive of its *principal value;* and with that impression, I must adjudge it to be null and void to that extent." Justice Brown, speaking of the character of the act, says: "If its office is one of mere regulation, to prescribe *by whom*, and to whom, and at what places liquors in certain quantities may be sold, then it does no more than the excise law which it is thought to supersede; and although *prejudicial to existing interests*, and may subject certain classes to *some privations and inconvenience*, it is nevertheless a law of binding obligation, which the people must obey and the tribunals of justice enforce." Speaking of the written limitations upon legislative power, contained in our state constitution, the learned justice adds: "They were intended to save absolute inherent rights from the power of legislative acts which *interrupt their enjoyment* or *impair* their value. * * * There can be no property, in the legal and proper sense of the term, where neither the owner or the person who represents the owner has the power of the sale and disposition. That which cannot be used, enjoyed or sold, is not property; and to take away all *or any* of these incidents, is in effect to deprive the owner of his property."

Both of the learned justices from whose opinions I have quoted, concede the power of the legislature to regulate the "manner of selling," and to prescribe "by *whom* liquors in

certain quantities may be sold." Upon what principle, consistent with this constitutional provision, if it is applicable at all to this species of legislation, can the legislature, in the language of one of the learned justices, prescribe "*by whom*" liquors in certain quantities may be sold, or in the language of the other learned justice, designate a "*selected class*" to sell in such quantities, while it *prohibits* others from doing the same thing. Those who do not happen to be thus "*prescribed*," who do not belong to the "selected class," and who may happen to own liquor in quantities less than those in which all are authorized to sell, would be as effectually "*deprived of their property*" under such a law, as those who own larger quantities are so deprived by this law. It is no answer to say that such a law would affect but few persons and a limited amount of property, nor that its object is to *regulate* "*only so far as to prevent abuse.*" The protection of this constitutional provision, in its letter and spirit, extends in equal measure to each individual, and the aggregate population of the state, and to *all property*, whether its value is measured by mills or millions. It matters not whether a few, or many, are deprived of their property, or whether the amount of which they are deprived be small or great—whether a person is deprived of an inconsiderable portion or all of his property. The constitutional prohibition is not fractional, but an unit, indivisible and absolute. It regards the *character of the act* and not the *extent of its consequences.* If the act is prohibited, no consideration of consequences can change its character, nor can it be palliated by the purpose which prompted it, however laudable. If, therefore, a law, which in its operation diminishes the value of property, can be regarded as *depriving* the owner of it, no law that produces that effect can be sustained. The argument under consideration, when followed to its logical consequences, will not, and cannot be satisfied with the overthrow of the law in question. Many of our police and sanitary, and all of our commercial regulations, our quarantine and usury laws, must share the same fate. Their effect upon property is the same—the difference is only in degree; and if this constitutional provision

applies to any such laws, it necessarily prohibits all. For the attempted distinction between the "*essential characteristics*" of property and any of its incidents or qualities which are regarded as elements of its value, whether they "*constitute its main value*," or only a small part of it; and between laws which "subject certain classes to *some privations*," and laws which affect all classes, and involve great privations, there is no foundation in the constitution whose protection and prohibitions are general; nor, I respectfully submit, in reason, which rejects distinctions where it fails to perceive differences. The validity of such laws rests upon no restricted construction of this constitutional provision, but upon a principle of the common law older than constitutions, coeval with the earliest civilized ideas of property. That principle is, that every man shall so use and enjoy his own, as not to injure another, and especially that the use which he makes of his property shall not work a public evil. This is another *incident* to the right of property *as inseparable* from the title as the right of sale, or any other right of enjoyment annexed to it. The legislature which exercises the sovereign power of the state is clothed with the power, and charged with the duty, of promoting its prosperity by regulating its internal commerce, and holding out suitable encouragement to the industry of its citizens; of preserving the public peace by preventing and punishing crime, and guarding the health and morals of the people by such laws and regulations as in its judgment may seem likely to promote these objects. *Subject only to the limitations prescribed by the constitution*, the powers of the legislature for these purposes are unlimited. In the choice of the means its discretion is plenary. If, in its judgment, the trade in any article is incompatible with, or dangerous to any of these objects of its protection, that trade may be regulated, restricted or *prohibited, in the discretion of the legislature.* It is admitted that the sale may be *controlled*, but it is claimed that it can be done "*only so far*" "*as to prevent abuse.*" According to this proposition, if abuse should be found inseparable from, or so generally attendant upon the exercise of the right as to render the permission of

the one and the prevention of the other impracticable, the right to prohibit would necessarily follow. Whether this abuse is so intimately connected with this traffic is a question of fact, proper for the consideration of the legislature, in the exercise of its discretion, to ascertain the necessity and determine the extent of its action; but this is an inquiry which the court cannot entertain, in considering a question of power. The foregoing positions cannot be more clearly illustrated or more powerfully enforced than they are in the language of Chief Justice Marshall, in *Brown* v. *Maryland*. In reply to the argument of the counsel for the state, in favor of the power there claimed, to lay duties on imports, or to require importers to procure licenses from the state to sell their imports, in which it was urged that the states would not be likely to impose such terms as to discourage or diminish importation, the chief justice said: "It is obvious that the same power which imposes a light duty can impose a heavy one, one which *amounts to prohibition*. Questions of power do not depend on the degree to which it may be exercised. If it *may be exercised at all*, it must be exercised *at the will of those in whose hands it is placed*. * * * The question is, *where does the power reside, not how far will it be probably abused*. The power claimed by the state is, in its nature, in conflict with that given to congress, and the greater or less extent in which it may be exercised, does not enter into the inquiry concerningits existence."

The law of this state, which was superseded by the act in question, was probably as favorable an illustration of the exercise of the *regulating* power as could be instanced. I understand both of the learned justices, whose opinions are above quoted, to concede the validity of its provisions. And yet a slight consideration of its practical effect will show that the alleged "absolute and inherent rights" of the owners of this property did not escape the obnoxious effect attributed to the law in question, but that on the contrary it "interrupted their enjoyment and impaired their value." It prohibited all but a "selected class" from selling in less quantities than five gallons.

and thus not only "interrupted," but *destroyed* the right to that extent. It circumscribed the market, and decreased the demand for the article to a certain extent, and thus "impaired its value" to the same extent. Similar illustrations might be drawn from our quarantine and health laws, and the police and other regulations of municipal corporations. But I propose to pursue the history of legislation on this subject, and to examine briefly some of the adjudications upon the laws of other states. By the law of Massachusetts, under which one of the license cases arose, all persons were prohibited from selling liquors in quantities less than twenty-eight gallons, without a license, and the act contained a provision that the commissioners of excise should in no case be compelled to grant a license. This law, it will be seen, exercised the power of *regulation* to an extent approaching very nearly to *practical prohibition*. The law of Rhode Island, under which another of those cases arose, contained a provision similar to that of the Massachusetts law, fixing the minimum quantity that might be sold without a license, at ten gallons. The law of New Hampshire went still further, and prohibited *all sales* without a license. There was no provision in the law under which licenses, to any extent, could be procured as a matter of right. The power of granting and refusing licenses was to be exercised in the discretion of the officers designated for that purpose. It will be seen that *absolute prohibition* might result from the operation of this law. That this was the design of the law, and the effect of its operation in a great majority of cases, no one can doubt. That all of these laws contained unusually stringent restrictions upon the sale of liquor, that they seriously interrupted the enjoyment and impaired the value of the right of sale, no one will deny; but whether the right, in the language of Justice Strong, was even "essentially preserved" by the New Hampshire law, might well be doubted. As was natural, these laws encountered sturdy opposition from the interests so seriously affected by them. They were subjected to the most searching judicial scrutiny, and their validity was affirmed by the supreme courts of the respective states. The constitution of

each of those states contained the same prohibition against depriving citizens of their property, "without due process of law," as is relied on in this case; and yet it is a remarkable fact, that in all the discussions which these cases underwent in the state courts, this objection was not suggested. The question, as we have seen, which was argued in the supreme court of the United States was, whether those laws were in conflict with those of congress, regulating commerce. The question now under consideration could not arise in that court, and for that reason the decided opinions of the chief justice and other members of the court, in favor of the right of the states to prohibit entirely the domestic traffic in liquor, cannot be regarded as authority, in the strict sense of the term, on this point. But the construction by that court of the state laws, which in their terms comprehended *all liquors*, limiting their application to the domestic trade for the purpose of maintaining the validity of those laws, shows the high sense entertained by that court of the importance of preserving in its utmost latitude the power of the states to control by restrictions or prohibitions their domestic trade. A legislative recognition of the same principle, equally significant, is found in the excise laws passed by congress in 1794 and 1813, each of which contained a proviso that no license to sell liquor should be granted under the law to any person who was prohibited from selling by the laws of any state.

Another instance of the exercise of this power of regulation to the extent of *absolute prohibition* is furnished in the embargo laws passed by congress in 1807, which prohibited all *importation* and *exportation* to or *from any foreign country*. The laws were by their terms unlimited as to the time of their duration and were maintained in full force for nearly two years It was objected to them that the constitutional power to regulate commerce under which the laws were passed did not authorize congress to *destroy* commerce, as those acts confessedly did. The question was raised in the district court of the United States, for the district of Massachusetts, in the case of *The United States* v. *The Brigantine William*, (2 *Hall's Law*

*Journal*, 253.) in which a libel was filed to enforce a forfeiture of the vessel for being engaged in the exportation of merchandise in violation of those laws. It was argued in behalf of the claimant that the acts of congress were utterly void; that there was not only an entire want of power in the constitution to prohibit commerce, but that the act was in direct violation of the grant of power to regulate, which necessarily implied the duty of preserving the thing to be regulated. The court held the law to be constitutional. Davis, district judge, in an elaborate opinion, examined the question in all its bearings. In discussing the questions as to the nature and extent of legislative power, and the *restrictions upon it which could be enforced by the judiciary*, the learned judge said, "*affirmative provisions and express restrictions contained in the constitution* are sufficiently definite to render decisions, probably in all cases, satisfactory, and the interference of the judiciary with the legislature, to use the language of the constitution, would be reduced to '*cases*' easily to be understood, and in which the superior commanding will of the people, who established the instrument, would be clearly and peremptorily expressed. To extend the censorial power further, and especially to extend it to the degree contended for in the objections under consideration, would be found extremely difficult, if not impracticable in execution. To determine where the legitimate exercise of discretion ends, and usurpation begins, would be a task most delicate and arduous. Before a court can determine whether a given act of congress, *bearing relation to a power with which it is vested*, be a legitimate exercise of that power or transcend it, the degree of legislative discretion admissible in the case must first be determined. *Legal discretion is limited.* * * * Polical discretion has a far wider range. It embraces, combines, and considers all circumstances, events and projects, foreign or domestic, that can affect the national interests. *Legal discretion has not the means of ascertaining the grounds upon which political discretion may have proceeded.* It seems admitted that necessity might justify the acts in question. But how shall *legal discussion* determine that *political discretion*,

surveying the vast concerns committed to its trust, and the movements of conflicting nations, *has not perceived such necessity.*" Speaking of the objects for which this power may be exercised, the learned judge said, "The mode of its management is a consideration of great delicacy and importance; but the national right or power, under the constitution, to adapt regulations of commerce to other purposes than the mere advancement of commerce, appears to me unquestionable." The late Justice Story, in commenting upon this provision of the constitution, and in the same connection on the embargo laws, and the question involved in the case just cited, says: "No one can reasonably doubt that the laying of an embargo, suspending commerce for a limited period, is within the scope of the constitution. But the question of difficulty was, whether congress, under the power to regulate commerce with foreign nations, could constitutionally suspend and interdict it wholly for an unlimited period, that is by a permanent act, having no limitation as to duration, either of the act or of the embargo. * * * An appeal was made to the judiciary upon the question, and it having been settled to be constitutional the decision was acquiesced in, though the measure bore with almost unexampled severity upon the eastern states—and its *ruinous effects* can still be traced along their extensive seaboard. * * * Non-intercourse and embargo laws are within the range of legislative discretion; and if congress have the power, for purposes of safety, of preparation or counteraction, to *suspend* commercial intercourse with foreign nations, they are not limited as to *duration*, any more than as to the manner and extent of the measure."

The effect of these laws upon private property was far more extensive and destructive than any that can possibly result from the law in question. The right to export property, designed and valuable only for that purpose, was one of those "essential and definitive characteristics which constituted its main value." The prohibition was "*destructive of its principal value*," and property of the value of many millions was rendered worthless by their operation. The constitution of the United States contains the same restrictions upon the legislative

power of congress that is imposed by the constitution of our state upon its legislature, that no man shall be deprived of his property without due process of law. But in all the opposition which the embargo laws encountered, the objection that they violated this provision of the constitution occurred to none of its astute and able opponents.

The case of the William is a direct *authority* for the proposition that the national government, under the constitutional grant of power to regulate commerce, may restrict it, *in its discretion;* that such restriction may be carried to the extent of absolute prohibition, and that this power is not restricted to measures exclusively beneficial to commerce, but that it may be exercised as an instrument for other purposes of general policy and interest. These propositions may, in my opinion, be rested with equal safety upon the *authority* of this case, and the conclusive *reasoning* by which it is sustained. The powers of congress are enumerated in the constitution, and are expressly restricted to those so enumerated. The power in question is limited to commerce with foreign nations, and among the states. That the same power over internal commerce is reserved in all its amplitude by the several states, is not questioned, and that a state, by virtue of its powers of original sovereignty, which are merely limited by *specific restrictions* and not *enumerated* in its constitution, may, in the absence of such restrictions, exercise the same control over its domestic commerce, as that exercised by congress over foreign commerce, and for the same purpose, cannot be doubted.

In view of this long continued and uniform course of legislation, based upon the concurring authority of the general government and the several states, sanctioned by general acquiescence, and vindicated by judicial authority, whenever questioned, accompanied as such legislation has uniformly been, by cotemporaneous constitutional restrictions, identical with the restriction now invoked against this law, the question as to a conflict between the law, in the respect now under consideration, and the constitution, must be regarded as settled.

The prohibition in this act, as I have remarked, does not affect

the possession of the property. It does not interfere with the right of sale, except within the state, and notwithstanding this prohibition, those interested in this property may manufacture and export it for sale elsewhere. I say notwithstanding this prohibition. I am aware that there are provisions in the act which were perhaps designed, and which may possibly be construed to prevent this. The provision that it shall not be *kept* in any place, except a dwelling house or church, has been cited with others supposed to evince a destructive purpose towards this property, which are alleged to be plainly repugnant to the constitutional rights of the citizen. But the defendant has not been prosecuted, nor has his property been proceeded against under these provisions. When he is indicted for *keeping* liquor, in violation of this act, or proceedings are instituted to enforce a forfeiture of his liquor, for any such cause, different questions will be presented. With these questions we have nothing to do in this case. When they are legally presented for our consideration, the parties interested in them will be entitled to the deliberate and unbiased judgment of the court upon them. But to secure this, it is not only proper, but indispensable, that the parties interested, instead of the court, should be first heard. The legislature have said that the defendant shall not sell intoxicating liquor in this state. He has chosen to disregard that injunction, and has been convicted of an offense against the law. He disputes the right of the legislature to pass the law, and this question and the question of construction heretofore considered, we are called upon to decide—nothing more. With the questions as to the wisdom, policy and propriety of the law, which were discussed with so much zeal by the defendant's counsel at the bar, we have nothing to do. Those are questions addressed exclusively to the discretion of the legislature. This is a mere question of power. If the power which the legislature has assumed to exercise, exists, and the law is plain, the duty of the judge and the citizen is the same—that of simple obedience. To both alike it speaks the language of command, and not of persuasion. I know of no principle recognized by the constitution, or resulting from any sound theory of government, which

requires or authorizes the judiciary to interfere between the legislature and the people to shield the latter from the consequences of an improvident or capricious use, or even a positive abuse, of legislative power. The remedy for such abuses, if they exist, is in other hands. It rests with the people, who in their constitution, have established the only restrictions upon legislative power that can be judicially recognized or practically enforced, except by those in whom the ultimate powers of sovereignty reside.

The judgment of the court of sessions should be affirmed.

[Niagara General Term, September 3, 1855. *Bowen*, *Mullett* and *Greene*, Justices.]

20 616
1L 280
6L 281
35a 277
42a 324

## Rich *vs.* Milk.

A chattel mortgage was executed by P. in the usual form, to K., transferring to the mortgagee the legal title to the property. By the first clause of the condition this title was made defeasible upon the payment of the mortgage debt according to the terms of the condition. By another clause it was provided that if default should be made in such payment, or if K. should at any time deem himself in danger of losing his debt by delaying the collection thereof until it became due, he might take possession of the property *at any time*, *before* or *after* the time limited for the payment of such debt, and sell the same, or so much thereof as should be necessary to satisfy the debt, &c. *Held* that this latter clause did not, by *implication*, give to the mortgagor the right to retain the possession of the property until the happening of the contingency; but that the power given to the mortgagee, by that stipulation, was intended as a cumulative remedy, merely, and did not qualify his right, as the legal owner, to the possession of the property *at all times*, before the performance of the condition which was to defeat his title.

It was accordingly *held*, *further*, that an assignee of the mortgage had a right to take possession of the property and to retain it, as against the mortgagor, and all claiming under him, before the mortgage debt became due and payable.

THIS action was commenced before a justice of the peace of the county of Cattaraugus. The plaintiff complained in trover for five cows, converted by the defendant. The defendant

by his answer, denied the complaint, and justified the taking, under a chattel mortgage, of which he was the assignee. The plaintiff recovered a judgment for $55 damages and costs. The defendant appealed to the county court, where the judgment was affirmed. He then brought an appeal to this court.

*W. Woodbury*, for the appellant.

*C. C. Torrance*, for the respondent.

*By the Court*, GREENE, J. This is an action brought to recover the value of the plaintiff's special property in five cows, which he alleges have been wrongfully converted by the defendant. The plaintiff claims under a contract with one William R. Phillips, by which he hired the use of the cows of Phillips for a year, which had not expired at the time they were taken from the plaintiff's possession, by the defendant. The defendant claims the property under a chattel mortgage executed by Phillips to one Kellogg, on the 4th day of December, 1852, to secure the payment of $170.92 in six annual payments. This mortgage was assigned by Kellogg to the defendant, on the 3d day of May, 1853, and the cows were taken from the plaintiff's possession by the defendant, a few days after the assignment of the mortgage to him. The precise time when the cows were hired by the plaintiff of Phillips is not stated in the case, but it is apparent from all the evidence, and particularly from that given by the plaintiff on the question of damages, that the contract of hiring was made in the spring of 1853, after the execution of the mortgage under which the defendant claims. This fact was virtually conceded by both parties at the trial, and must be assumed here.

The question then is, had the defendant a right under the mortgage to take the property therein described, *before the mortgagee's debt became due?* The mortgage is in the usual form, and transfers the *legal title* to the property to the mortgagee. By the first clause of the condition this title is made defeasible upon the payment of the mortgage debt according to

the terms of the condition. The condition also contains another clause, providing that if default be made in such payment, or if the mortgagee shall at any time deem himself in danger of losing his debt by delaying the collection thereof until it becomes payable, he may take possession of the property *at any time, before or after* the time limited for the payment of such debt, and sell the property or so much thereof as shall be necessary to satisfy the debt and reasonable expenses.

If the condition of the mortgage had contained the usual clause of defeasance *merely*, there can be no doubt that the mortgagee, in whom the legal title to the property was vested by the mortgage, would have had the right, by virtue of such title, to take and retain the possession of the property until the payment of the mortgage debt. But it is claimed by the plaintiff, that the clause giving the mortgagee the right, in case he shall deem himself in danger &c., to take and sell the property and pay the mortgage debt, *by implication* gives the mortgagor the right to retain the possession until the happening of that contingency. The argument is that it is apparent from this clause that such was the *intent* of the parties. It is certainly remarkable that the intent, if it existed, to secure such a right to the mortgagor, should be found so obscurely shadowed forth, or rather so ingeniously concealed in a stipulation which in all its terms relates exclusively to the rights of the mortgagee. It is said that if the mortgagee had the title and the consequent right to take possession of the property, independent of such a stipulation, the parties could have had no other object in inserting it than to limit the exercise of that right. But a little attention to the terms of the stipulation will show that it materially enlarges the rights of the mortgagee, and gives him remedies which he would not have had under a mortgage which did not contain this clause. Under a mortgage of the latter description he would take a title to the property, defeasible upon the performance of the condition. Upon a failure in such performance, the title would become absolute at law, and the mortgagor's only remedy, if any, would be by a bill in equity to redeem. This equity of redemption could be foreclosed by the mortgagee either

by a bill filed for that purpose, or by the shorter process of a sale of the mortgaged property, on reasonable notice to the mortgagor, *after default.* (*Charter* v. *Stevens*, 3 *Denio*, 33.) But by virtue of the stipulation in question, the mortgagee, if he deems himself in danger of losing his debt by delaying its collection, may proceed and foreclose the rights of the mortgagor *before any default* on his part. It is plain, therefore, that the power conferred upon the mortgagee by this stipulation was intended as a *cumulative remedy* merely, and that it was not intended, and cannot be held to qualify the mortgagee's right, as the legal owner, to the possession of the property, *at all times*, before the performance of the condition which defeats his title.

It follows that the defendant below had a right to take possession of the property in question and to retain it as against the mortgagor and all claiming under him, during all the time that the plaintiff claimed it under his contract with the mortgagor. It is unnecessary to decide whether the mortgagee, when he exercises the power conferred by the clause in question, must prove the happening of the contingency mentioned in the stipulation. This is a question in which the plaintiff has no interest. The defendant had a right to take and detain the property as against him, and if he has sold it without right and foreclosed the mortgagor's rights, he is answerable to the mortgagor, but not to the plaintiff.

The judgment of the county court, and that of the justice's court, must be reversed.

[Niagara General Term, September 3, 1855. *Bowen*, *Mullett* and *Greene*, Justices.]

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## GRIFFITH *vs.* FOLLETT.

In an action to recover damages for a neglect of duty by the defendant as canal commissioner, the complaint alleged that the defendant *being canal commissioner*, it was his duty to repair the banks of the canal at the place where the injury was sustained. *Held* that this allegation of the defendant's official character was made for the purpose of charging him with the duty for a neglect of which the action was brought; and that if any neglect of official duty which rendered him liable to an action, in any form, was alleged, the action was properly brought against him in his private character; and that the several causes of action were properly united.

*Held also*, that it was no objection to the complaint, that it did not contain any averment that the defendant had funds sufficient to repair the banks of the canal.

The question, as to the liability of a canal commissioner, for a neglect of duty, depends, in each case, upon the *character* of the duty which the statute has imposed upon him. If it is *imperative*, and specific, the commissioner is responsible to any person who has sustained an injury in consequence of his neglect of duty.

But if the duty is to be discharged according to the *discretion* and judgment of the commissioner, he cannot be held responsible to a party who has sustained an injury either by the manner in which he discharges it, or by a neglect to do any particular act falling within the general scope of his duties.

A canal commissioner is to examine the works committed to his charge, and from such examination he is to ascertain and determine, that is, *decide* as to the necessity for any *particular* repair, and act accordingly.

It is not his duty to make repairs when, or as, he may be requested or advised by others. But as to the necessity of such repairs, their nature and extent, and the time when they are to be made, he is to be guided by his own judgment. And his judgment is conclusive, upon the question, and cannot be called in question collaterally, in an action brought by a party who has sustained an injury by the commissioner's neglect to act, in any particular case.

There is, however, a class of cases in relation to which the duty of the commissioner is, *in its nature*, absolute and certain. Thus, when the navigation of the canal is *interrupted* or *impeded* by any obstruction of the channel, or by the destruction of any bank or structure, the necessity for immediate repairs is apparent, and the duty of the commissioner to make them is imperative.

He has no discretion to exercise, in such a case, as to the necessity of repairing, but is bound to make the repairs without delay; and for a neglect to make them, after notice of the facts showing their necessity, the commissioner is liable to any party injured by the neglect.

APPEAL from an order made at a special term, sustaining a demurrer to the first and second counts of the complaint, and overruling the demurrer as to the other counts.

The first count of the complaint alleged that at the several times therein mentioned, the defendant was a canal commissioner of the state of New York, and had section No. 14 of the Erie canal under his charge; and that as such commissioner, it was his duty to keep the said section in such repair that canal boats might navigate the same safely. That for a long time before the 18th day of September, 1853, the defendant *negligently and carelessly, and not regarding his duty in that behalf*, suffered the banks of the canal upon the said section to become weak and dangerous so "that there was great danger that a break would occur therein, at the place where the break mentioned in the first count did occur, and so that it was dangerous and unsafe for canal boats to navigate that part of the canal, and that they could not navigate the same without danger of loss and damage to said boats and their cargoes; *of all which the defendant had notice and which he well knew.* That the defendant negligently and carelessly permitted the said bank to remain weak and dangerous and without repair, until the said 18th day of September, when a break occurred in said bank by reason of such negligence. That when the said break occurred, a canal boat belonging to the plaintiff was navigating that part of the canal, laden with a cargo of wheat, and that by means of said break said canal boat was sunk and broken and the boat and its cargo lost to the plaintiff. The second count contained the same averments as the first, and the additional averments that at the several times stated in the first count the defendant as commissioner, had sufficient funds in his hands to repair the bank in question, and that he negligently and carelessly suffered the bank to become and remain weak and dangerous "without expending or applying any of the money aforesaid in or about its repair, until after the break in question occurred." The third count alleged the ownership of a canal boat by the plaintiff, that he intended to carry, in the same, on said canal, a cargo of wheat, and that the defendant destroyed and converted the boat to his own use and thereby hindered the plaintiff from carrying the said cargo, whereby the plaintiff lost said boat and the freight that he might have earn-

ed on said cargo. The fourth count was in trover, for the conversion of a canal boat, by the defendant.

To the first and second counts the defendant demurred, first on the ground that they did not set forth a cause of action; and second, that there was a defect of parties in that the defendant should have been sued *as canal commissioner*, and not in his individual capacity. There was also a demurrer to the whole complaint, on the ground that several causes of action had been improperly joined. The demurrer to the first and second counts, on the ground that they contained no cause of action, was sustained. The demurrer for defect of parties and for non-joinder was overruled, and both parties appealed.

*Geo. B. Hibbard*, for the plaintiff. I. The general rules as to the liability of officers are these: (1.) A public officer who is by law required to act in certain cases according to his judgment or opinion, sworn to discharge his duties, and subject to penalties for neglect, is not liable to a party for an omission arising from neglect or want of skill, if acting *bona fide*. (*Bac. Abr. art. Office and Officers, O, and cases cited.*) (2.) An officer intrusted by the common or statute law is liable to an action for negligence in the performance of his trust or duty, or for fraud or neglect in the execution of his office. (*Bacon's Abr art. Office and Officers, O, and cases cited.*)

II. The first ground of demurrer is not well taken. (*See* 1 *R. S.* 220, § 17, [18.] "Whenever in the opinion of the canal commissioners it shall become necessary or expedient to make any *extraordinary repairs or improvements* on any completed canal, such as the opening of *new* feeders, or the construction of *additional* locks, dams, *embankments*, tunnels or aqueducts," it shall be their duty to make out plans, submit them to the board, and when the board or the legislature shall order them, &c. to carry them out. (*See* 1 *R. S.* 221, § 23, [§ 25;] §§ 99, 100, *p.* 236.) "Whenever the navigation of any of the canals shall be interrupted or endangered, it shall be the duty of the commissioners, without delay, to repair the injury causing or threatening such interruption, and for that purpose they shall

have power to enter upon and use any contiguous lands, and to procure therefrom all such materials as in their judgment may be necessary or proper to be used in making such repairs." (*See* 1 *R. S.* 222, § 29, [33].) The previous section having said that the canal board "shall from time to time assign to each acting commissioner in special charge the line or portion of the line of one or more of the canals," the section referred to says, "it shall be the duty of each acting commissioner, 1. To examine frequently and carefully into the state of the canals and works committed to his charge. 2. To direct and cause to be made such ordinary repairs as he shall perceive to be necessary. 3. To superintend and cause to be made such extraordinary repairs or improvements as shall be ordered. 4. To make by himself, or a superintendent of repairs, all necessary contracts for the supply of materials and the performance of labor." The repairs which were omitted to be made were "ordinary repairs." (*See Laws of* 1834, *p.* 787.) But whether technically ordinary repairs or not, yet in the precise case stated in the complaint, the defendant is liable for the infraction of duty prescribed by the second section above quoted. (*See Adsit* v. *Brady*, 4 *Hill*, 630, *and cases and statutes referred to. Wilson* v. *The Mayor of New York*, 1 *Denio*, 595.)

III. The second ground of demurrer is not well taken. (*See authorities &c. under last point.*)

IV. The third ground of demurrer is not well taken. The law will presume that the plaintiff was rightfully in the canal, till the contrary is shown. The complaint alleges that the plaintiff was not in fault. He is alleged to have been in business lawful to be done, and so recognized by many general laws. It would be the statement of a conclusion of law and therefore improper. (5 *Sand.* 507.)

V. The fourth ground of demurrer is not well taken. (*See authorities, &c. under point* 1.) The authorities relied upon for showing that it is necessary to allege funds in the hands of the defendant are cases where the officers did not have power to raise funds. In this case the defendant not only had means supplied by law, but ample power to complete all repairs. (*See*

*Adsit* v. *Brady*, 4 *Hill*, 630, *and cases and statutes referred to.*)

VI. The first, second, third and fourth causes of demurrer to the second count are badly taken, for the reasons specified under point 2. It is also made a cause of demurrer, that "there is a defect of parties," in this, that the defendant is sued as an "individual," and not as an officer. This is bad, for the reason that he is not sued as an officer, or as a *quasi corporation* with an official fund to resort to. He is sued as an individual, and his description as an officer has nothing to do with his character as defendant. His holding the office and neglect of its duties are the very elements of the action, and these are stated. There is no such "defect of parties," or any other good cause of demurrer, in this particular.

VII. The last alleged cause of demurrer is not well taken. (1.) The matters stated in the different counts are "evidently" "transactions connected with the same subject of action." (*See Code*, § 167, *sub.* 1.) (2.) The causes of action are for injuries "with or without force to property." (*See Code*, § 167, *sub.* 1; *Rodgers* v. *Rodgers*, 11 *Barb.* 595.)

*W. G. Bryan*, for the defendant. I. The first and second counts are identical, except that the first omits to state that the defendant had funds sufficient to make the repairs alleged to have been necessary, &c. We will first discuss the question whether, (conceding defendant to have had funds, and the boat to have been lawfully navigating the canal,) there is any legal liability as against the defendant to make good the plaintiff's loss. The action is novel and without precedent. Canal breaks and detentions are disasters constantly occurring. It is believed the commissioners have never before been prosecuted as personally liable therefor. The novelty of a particular action or defense when the facts on which it is founded are of common occurrence, is a strong argument that it cannot be upheld. (*Costigan* v. *The Mohawk and Hudson R. R. Co.*, 2 *Denio*, 609.) "This fact [that no similar action had ever been brought] affords a very strong presumption that no such action will lie." (*Bart*

*lett* v. *Crozier*, 17 *John.* 451.) Before a party can bring an action for official negligence he must show a legal duty peculiar to himself and a particular obligation to himself. (*Bank of Rome* v. *Mott*, 17 *Wend.* 555.) No particular right of the defendant has been violated. There must be a particular right, as well as a particular injury. It pertains to the public only to avenge the injury. (*Butler* v. *Kent*, 19 *John.* 223. *Spear* v. *Cummings*, 23 *Pick.* 226.) The canals are not public highways, and boats can only navigate them by special permission, and on compliance with statute regulations. (1 *R. S. 2d ed. p.* 271, §§ 156, 162. *Hart* v. *The Mayor of Albany*, 9 *Wend.* 571.) Canal breaks, slides, &c. are perils of navigation against which neither the state nor its officers are *insurers*. The forwarder takes the canal as it is, subject to all accidents. His policy of insurance is protection against dangers of inland navigation. If this action will lie, then the least error of judgment or inattention would subject the canal commissioner to responsibilities so enormous and dangerous that no rational man would venture to accept such a trust. If liable for a mere *omission*, then any evidence tending to show knowledge of the necessity of repairs, with funds &c., would expose the commissioner to heavy verdicts.

II. Necessity for repairs involves the matter of *discretion*, a *quasi* judicial act, and for omission to direct repairs no action will lie, unless it be willful or malicious. He is made a judge of the *necessity* for repairs, &c., and his action is therefore not purely ministerial. By implication this doctrine is sanctioned in *Adsit* v. *Brady*, (4 *Hill*, 632,) which is the case on which the plaintiff relies. Bronson, J., says: "It is said the defendant has a discretion as to what repairs were needed, and consequently that his neglect should have been charged to be willful and malicious. (8 *Wend.* 462.) But clearly he had no discretion to leave this dangerous obstruction in the canal." All that case decides is that the neglect of a superintendent of repairs to remove a conceded, palpable obstruction was *willful*. There is an obvious distinction between neglecting to repair to an extent adequate to prevent injury, and a refusal to remove a

dangerous obstruction actually existing. The one is a present necessity, the other a prospective or possible necessity. Besides, by 1 *R. S. p.* 277, § 210, it is made the special duty of the commissioner, superintendent &c., to seize any floating or sunken thing which may be found in a canal. The words "perceive to be necessary" are the same in legal significance as the words "shall deem" and "shall in their judgment be necessary," as used in 1 *R. S. p.* 248, § 17, or "shall be deemed necessary," in § 21, or "as in their judgment may be necessary or proper," as used in § 25. There is no real parallel between the duty and liability of commissioners of highways and that of canal commissioners. The first have but a few miles of common highway to supervise, in their own neighborhood, and their duties in reference to them are of the plainest nature. The second have a territory so large that it can very seldom be under their own eye, and many of their duties require the aid of experts in engineering, hydraulics, &c. The proper height and strength of banks, &c. call for the exercise of skill and judgment. Their duties off the canal as members of the canal and contracting boards, and board of canal commissioners, are most onerous. See art. 2, general powers and duties of the canal commissioners, and art, 4, of the canal board, their powers and duties." But no private action will lie against even an overseer or commissioner of highways for neglect to keep the public bridges in repair. (*Bartlett* v. *Crosier*, *above cited.*) Nor would it, at common law. (*Mower* v. *Leicester*, 9 *Mass.* 247, *and* 23 *Pick.* 226, *above cited.*) It is believed that no precedent can be found for any action against a public officer at all resembling this, unless the omission complained of is averred to be *willful* or *malicious.* There is no such allegation in the two first counts, and therefore those counts are bad. Mere negligence, however gross, can never be equivalent to malice. (*Morse* v. *The Auburn and Syracuse R. R. Co.*, 10 *Barb.* 621.) It is submitted that the statute would have declared the extraordinary liability contended for by the plaintiff if it was to exist; but the statute affixes no penalty and creates no action.

III. If any state officer is personally liable for the injury

sustained by the plaintiff, it is the superintendent of repairs, and not the canal commissioner; the special and particular duty of repairing devolves primarily upon the superintendent. "It is the duty of each superintendent to *keep* in repair such section as shall be committed to his charge, to make all necessary contracts for that purpose," &c. (1 *R. S.* 3*d ed. p.* 269, § 145.) He is under the direction of the canal commissioners. "that is, the *general* direction; not in every act which he does specifically, nor need he wait to hear from the commissioners before stopping a breach." (*Shepherd* v. *Lincoln*, 17 *Wend.* 250. *M'Fadden* v. *Kingsbury*, 11 *id.* 667.) The superintendent is not a deputy of the commissioners, and before he can justify an apparent neglect of duty, he must show that the omission resulted from obedience to orders. It will not be presumed that they gave an illegal command. (4 *Hill*, 633.) The two cases relied on by the plaintiff to sustain this action were against a *superintendent of repairs.* The 1st, in 17th Wendell, for *misfeasance* in not avoiding negligence in the repairs he was prosecuting. He had entered upon his work and the injury arose from his mismanagement—from positive acts of his servants which the court held him accountable for. The 2d, in 4th Hill, 630, for not removing what the court termed a "dangerous obstruction," "*a nuisance.*" The plaintiff evidently feels the force of this reasoning, for he brought a precisely similar, a twin action, for the same injury, against the superintendent of repairs, and it is now pending.

IV. The plaintiff should have averred in terms that the repairs needed were *ordinary* repairs. If they were *extraordinary* they must be ordered by the canal board. (2 *R. S.* 3*d ed. p.* 248, § 18; *p.* 251, *sub.* 3, § 3.) A new or additional embankment might be required, and that it was not, appears (if at all) only by inference.

V. It does not appear that the plaintiff's boat was lawfully navigating the canal. If not, the defendant owed no duty to it. Every boat must first obtain certificate of registry, &c. (1 *R. S.* 271, § 156.) No boat shall be cleared without such certificate. (§§ 162, 165.) The allegation that the injury happened without

the plaintiff's fault, &c. is not equivalent to the averment omitted. He should declare himself to be *rightfully* there.

VI. The first count is bad because it omits to aver that the defendant had in his hands or under his control money or funds wherewith to make the repairs. (*Bartlett* v. *Crosier*, 17 *John.* 439.) It is no answer to this objection that the defendant had power to make contracts for materials and labor. He can have in the whole but $10,000 on hand at any one time, (§ 44,) to meet the numerous and heavy demands upon him. It should be averred as in the 2d count, that he had sufficient moneys or available means unexpended, at the very time, to meet the enormous expenses attending the prevention or reparation of canal breaks. That part of the decision of the learned justice at special term which held that neither the 1st or 2d counts "stated facts sufficient to constitute a cause of action," was right and should be affirmed.

VII. The defendant should have been sued in his name of office and not as an individual. That is the ordinary form of proceeding against officers for neglects of strictly official duty. There is therefore a defect of parties in the 1st and 2d counts. For willful trespass he could be sued as an individual, but not for a mere omission to perform purely official acts.

VIII. If the allegations in the first two counts as against the defendant as canal commissioner are to be taken as applying to *all* the counts, then the 3d and 4th are bad, inasmuch as they are drawn against the defendant as an individual, and not as an officer. If not to be so taken, they are bad as being improperly joined with the 3d and 4th counts. The 3d and 4th are in trespass for acts necessarily and *per se* willful; the 1st and 2d can only be sustained on the ground that they are in legal effect the same as if the defendant were proceeded against in his name of office in the summons and complaint. If so, how can they properly be joined and tried with the naked trespass alleged in the 3d and 4th? Such a construction would lead to great embarrassment and confusion at the circuit, and cannot be within the spirit and intent of section 167 of the code.

*By the Court*, GREENE, J. The causes of action disclosed by the first and second counts, if any, are not against the defendant in his official character. It is alleged that *being canal commissioner* it was his duty to repair the bank in question. This allegation of his official character is made for the purpose of charging him with the duty for a neglect of which the action is brought, and if any neglect of official duty which renders him liable to an action in any form, is alleged, the action is properly brought against him in his private character. I think the several causes of action are properly united, and that the demurrer, so far as it is founded on the alleged defect of parties and misjoinder of counts, was correctly overruled.

The important question in this case is, whether a cause of action is alleged in either of the first two counts. The case of *Adsit* v. *Brady*, (4 *Hill*, 630,) is a decisive authority against the objection to the first count that it contains no averment that the defendant had funds sufficient to repair the bank in question. With the exception of this unnecessary averment, which the second count contains, the two counts are identical in substance, and may be examined together.

The general powers and duties of canal commissioners are prescribed by article second of title nine of chapter nine, part first of the revised statutes. (2 *R. S.* 219.) The 9th section provides that "the general care and superintendence of the canals shall continue to be vested in the board of canal commissioners; so many of whom (not less than two nor more than three,) as may be designated by the board, shall be acting commissioners." The 23d section provides that "whenever the navigation of any of the canals shall be *interrupted or endangered*, it shall be the duty of the commissioners, without delay, to repair the injury *causing* or *threatening* such interruption." The 28th section provides that "the board shall from time to time assign to each acting commissioner, in special charge, the line or portion of the line, of one or more of the canals." The 29th section provides that "it shall be the duty of each acting commissioner, 1st, to examine frequently and carefully into the state of the canals and works committed to his charge; 2d, to

direct and cause to be made such ordinary repairs *as he shall perceive to be necessary*." These are the provisions touching the duties of canal commissioners in relation to repairs, and upon which the plaintiff relies to sustain his action. The question as to the liability of a commissioner, for a neglect of duty, must depend in each case upon the *character* of the duty which the statute has imposed upon him. If it is imperative and specific, the delinquent commissioner is responsible to any person who has sustained an injury in consequence of his neglect of duty. (*Adsit* v. *Brady, above cited.*)

But if the duty is to be discharged according to the discretion and judgment of the commissioner, he cannot be held responsible to a party who has sustained an injury either by the manner in which he discharges it, or by a neglect to do any particular act falling within the general scope of his duties. It is contended by the plaintiff that all of the duties imposed upon the commissioners by the sections above cited are imperative and absolute; that by the provisions of the 23d section their duty to repair the canals is the same when there is *danger* of an interruption to navigation, as when there is an *existing* interruption. This proposition is true in its general application to these two classes of repairs. When the necessity for repairs in either case, is shown to the commissioner, it is his duty "without delay" to make them. But when the navigation is in no way interrupted or impeded, how is he to know that it is *endangered*, or that such interruption is *threatened?* I think the answer is equally apparent from the nature of the duty and the language of the statute which prescribes it. He is to examine the works committed to his charge, and from such examination he is to ascertain and determine, or in other words *decide* as to the necessity for any *particular* repair, and act accordingly. It is not his duty to make repairs when or as he may be requested or advised by others. As to the necessity of such repairs, their nature and extent and the time when they are to be made, he is to be guided by his own judgment, not by the advice or importunity of officious and interested individuals. His judgment in such matters is conclusive upon the question, and cannot be

called in question collaterally in an action brought by a party who has sustained an injury by the commissioner's neglect to act in any particular case.

There is another class of cases, in relation to which the duty of the commissioner is, *in its natare*, absolute and certain. When the navigation of the canal is interrupted or impeded by any obstruction of the channel, or by the destruction of any bank or structure, the necessity for immediate repairs is apparent, and the duty of the commissioner to make them is imperative. He has no discretion to exercise, in such a case, as to the necessity of repairing, but is bound to make the repair without delay. But as to the extent of the repair and the manner in which it shall be made, he has the same discretion in such a case as in the cases first mentioned, subject, however, to the condition that the repair shall be sufficient to restore the canal to a navigable state. For a neglect to make such repairs after notice of the facts showing their necessity, the commissioner would be liable to any party injured by the neglect. This limitation of the commissioner's liability necessarily results from the nature of his duty. To this extent he would be liable on common law principles, by reason of the general duty imposed upon him by the statute to make all needful repairs. This rule is consistent with the character of his duty. It protects him in the independent exercise of his judgment, by absolving him from responsibility for errors, and holds him responsible only for a neglect of clear and imperative duty.

This view of the duties of the commissioners is in my opinion, sustained and clearly indicated by the provisions of the statute. Section 29 provides that the commissioner shall examine, frequently and carefully, into the state of the canals and works committed to his charge, and direct and cause to be made such ordinary repairs as *he shall perceive to be necessary*. This is equivalent to saying that he shall make such repairs as he shall deem or judge to be necessary. But this general language, like that of the 23d section, must receive a construction adapted to the subject matter to which it relates. We have seen that the necessity of certain repairs is, and must always

be a mere matter of opinion, and that such necessity must be determined by the judgment of the commissioner, to which the statute has confided it. On the other hand, the necessity of certain other repairs is clear and palpable. In regard to them the commissioner's duty is equally clear and imperative, and for its neglect he has no excuse.

These propositions are sustained and illustrated by the following cases. *Adsit* v. *Brady*, was an action brought against a superintendent of repairs for neglecting to remove a canal boat which had been sunk in the canal, against which the plaintiff's boat ran and was sunk. The declaration alleged that the sunken boat *obstructed* and rendered the navigation of the canal dangerous, and that the defendant knew it and neglected to remove the obstruction. In that case it was said that the defendant had a discretion as to what repairs were needed. But the court held that he had no discretion in the matter; that the boat being an *obstruction*, and the necessity of its removal apparent beyond all dispute, he was bound to remove it without delay. The case of *The Mayor &c. of New York* v. *Furze*, (3 *Hill*, 612,) was an action brought against the city of New York for neglecting to keep certain culverts and sewers in repair, by reason of which the plaintiff's premises were overflowed. By the charter of the defendants it was provided that it should be lawful for the corporation to cause common sewers, drains and vaults to be made in any part of the city. The court held the defendants liable. Nelson, C. J., in delivering the opinion, laid down the proposition in general terms that, although the terms of the statute were permissive only, as it was one of public concern, it was imperative and peremptory upon the corporation; and that when the public interest called for the execution of the power thus conferred, the defendants were not at liberty arbitrarily to withhold it. But independent of this principle, the learned chief justice held that after the corporation had exercised the power, and constructed sewers, they were bound to keep them in repair, and that for a neglect to repair any known defects in them, the corporation was liable to any party injured thereby. The case of *Wilson* v. *The Mayor*

*&c. of New York*, (1 *Denio*, 595,) was an action brought against the defendants for carelessly raising and grading a street opposite the plaintiff's lot, so as to obstruct the flow of water from her premises and to turn it on to them, and for *omitting* to make any sewer or drain to carry the water flowing from the street, from the plaintiff's premises. The court held that as the corporation had power to grade and construct the street, and all the proceedings for that purpose were regular, the plaintiff could maintain no action for any injury sustained by her in consequence of the *manner* in which the street had been constructed. It was also held that the action would not lie for the defendants' neglect to construct a sewer, although it was alleged to be *necessary* in that place. Beardsley, J., in delivering the opinion of the court, concurs with Nelson, chief justice, in the opinion expressed by him in *The Mayor of New York* v. *Furze*, that the provision of the statute *authorizing* the corporation to construct drains and sewers, was in its nature plainly imperative. The learned justice says: "it is equivalent to an express enactment that *it shall be the duty of the mayor, aldermen, &c., to make all needful sewers and drains in said city.* The statute imposes not only a moral but a legal duty to that extent, for a violation of which the guilty individuals may be indicted and punished. But so far as a civil remedy is concerned, it is otherwise. To that extent, the decision of those whose duty it is to pass upon the question is *absolutely conclusive.* They may err in holding that the work ought not to be made, or the decision may be the result of culpable neglect or corruption; still the law has authorized them to determine the question, and it will not permit their decision to be overhauled in a civil action."

I think the distinction between the cases cited, where the defendants have been held liable, and the case under consideration, is clear. In one of those cases, the navigation of the canal was impeded and endangered by an obstruction visible and apparent to all; in the other the sewers which the defendant was bound to keep in repair were obstructed and filled up so that they

would not carry off the water from the street. In this case, also, the necessity for the repair was apparent and the duty was clear. But in the case at bar the facts are different. No obstruction or impediment to the navigation of the canal is averred. It is alleged that the bank was weak and dangerous; that there was great danger that a break *would occur*, and that in consequence of the weakness of the bank and danger of a break, the navigation was dangerous; and that the defendant had notice of these facts. The substance of this averment is that the defendant knew the condition of this bank; that it was *in fact* so weak that there was danger that it would break; and that the defendant neglected to repair it. All this may be true, and still the defendant may be guiltless of any neglect of duty in the matter. The sufficiency of this bank and of all the other parts of the canal under the defendant's charge, the necessity of repairs in all cases of this kind, and the extent of the repairs required by the necessities of each particular case, were all matters which the law had committed to his discretion, and the question as to his duty in such cases, is one which, from its nature, must necessarily be determined by his judgment. For aught that appears, he had examined this bank and upon such examination concluded that no repairs were necessary. The fact that a breach subsequently occurred, shows that he was mistaken as to the sufficiency of the bank, but it convicts him of no neglect of duty. The allegation that the defendant negligently and carelessly and in disregard of his duty, suffered the bank to become and remain weak and dangerous, does not help the case. It does not change the fact that the duty to repair this bank depended upon the result of the exercise of the defendant's judgment. He may have judged unwisely, even *carelessly*, but for the purposes of a civil action, his judgment is none the less conclusive. When the law confides a discretion to its officers it will never allow their acts, done in good faith, within the limits of that discretion, to be questioned. They may be impeached and indicted for corruption, and punished criminally, but it is denied by Justice Beardsley, that

they are liable to a civil action in such cases. But the facts of this case call for no opinion on that question. I think the order of the special term should be affirmed.

Order affirmed.

[Niagara General Term, September 3, 1855. *Bowen, Mullett* and *Greene*, Justices.]

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## S. and J. Bigler *vs.* The New York Central Insurance Company.

20 635
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22a 402
55a 353

A policy of insurance upon a "steam saw-mill" covers not only the building itself, but all the machinery and fixtures therein, necessary to make it a steam saw-mill in all its parts.

Under a condition in a policy, requiring the assured to give notice to the insurers of any subsequent insurance which may be effected upon the same property, the assured is bound to give notice of a policy which is not void or voidable upon its face, but is merely voidable by the underwriters upon due proof of the facts.

If the assured retains the second policy until after the destruction of the property insured, and then brings an action upon it, thereby affirming its validity, which action is settled by the giving and accepting the notes of officers of the insurance company, which the insured still holds, he cannot treat the second insurance as void for the want of a compliance with one of its conditions, but is bound to give notice thereof; although the second policy be voidable if the insurers see fit to set up the defense.

MOTION by the plaintiff for judgment upon a verdict in his favor, at the circuit, subject to the opinion of the court, upon a case. The action was upon a policy of insurance.

*R. Balcom*, for the plaintiff.

*Geo. S. Tuckerman*, for the defendant.

*By the Court*, Mason, J. This case was tried before me at the Broome circuit in February last, and after hearing all the evidence in the case I directed a verdict for the plaintiff, subject to

the opinion of the court on a case to be made. I think this policy is broad enough to cover the machinery and fixtures in the mill. The insurance was for $1000, on the plaintiffs' steam saw-mill. The steam saw-mill embraces the whole thing—the whole mill, with its apparatus. It does not mean merely the building itself, but includes the whole machinery necessary to make it a steam saw-mill in all its parts. (10 *Barb.* 440. 2 *Hall's S. C. Rep.* 490. *Angell on Ins.* §§ 103, 104, 106.) The only remaining question in the case is whether the plaintiffs forfeited their insurance by procuring the subsequent insurance in the Globe Company. The contract of insurance in question contains the following condition: "And if the said insured or their assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to the secretary, and have the same indorsed on this instrument, or otherwise acknowledged by the corporation, in writing, this policy shall cease and be of no further effect." There can be no question, upon this contract, that when the plaintiffs obtained further insurance upon this mill it was their duty to give notice thereof to the defendants, and either have the same indorsed on the policy or otherwise acknowledged by the defendants in writing. (5 *Hill*, 147. 14 *Barb.* 206. 16 *Peters' U. S. R.* 495, 512.) If the plaintiffs neglected to comply with this condition, the policy was by the very terms of the contract to cease and be of no further effect. The plaintiffs entirely failed upon the trial to show compliance with this condition of their policy. If any notice was ever sent to the defendants, which it seems to me the evidence fails to show, it was nothing more than a notice that the plaintiffs had made application to the Globe Company for an additional insurance. Whether they succeeded in procuring it they never communicated to the defendants. This certainly was no compliance with the condition of the plaintiffs' contract, and this is not a case where notice to Bishop will answer the condition of the policy. The plaintiffs have expressly agreed that in case they shall effect any other insurance on this property, and shall not with all reasonable diligence give notice thereof to the defendants' secretary, and have the same indorsed

&c., this policy shall cease and be of no further effect. This entitles the defendants to have notice given to their secretary. It is a part of the contract, and cannot be dispensed with by this court. The plaintiffs claim and insist, however, that the policy issued to them by the Globe Company was a void policy, and that consequently no notice of the same was required to be given to the defendants. It was shown upon the trial that the Globe Company had no notice of the existence of the defendants' policy until after the property was destroyed by fire. There was a clause in the Globe policy "that in case the assured shall have already any other insurance against loss by fire, on the property hereby insured, not notified to the company and mentioned in or *indorsed upon this policy, then this insurance shall be void, and of no effect.*" This clause undoubtedly relieved the Globe Company from liability on their contract of insurance. No action could be maintained upon it if they saw fit to set up the defense. The Globe policy was not void upon its face; but as soon as the fact was alleged and proved it relieved that company from any liability upon their contract. The real question, therefore, presented for our adjudication, is whether this policy in the Globe Company can be set up by the defendants to avoid their contract of insurance with the plaintiffs. In other words, whether an insurance that shall operate to avoid the defendants' policy under the clause to which we have adverted must not be a valid policy—one that is binding on the insurers. I have not been able to find any adjudged case in the courts of this state determining this question. The case of *Carpenter* v. *The Providence and Washington Ins. Co.*, (16 *Peters*, 49, 508, 9,) determines the question in favor of the defendants; and if that case is to be followed, the plaintiffs are not entitled to judgment upon their verdict. That case holds, that under such a condition in a contract of insurance, notice of subsequent void or voidable policies must be given to the underwriters, unless the policy is void upon its face, without any reference whatever to extrinsic facts. (16 *Peters*, 510.) The Globe policy was not either void or voidable upon its face. It was merely voidable by the underwriters, upon due proof of the facts. In this very case the

plaintiffs held on to that policy until after the destruction of the property insured, and then brought an action upon the policy, against the Globe Company, thereby affirming the validity of the policy, and which suit the Globe Company settled by giving the promissory notes of certain officers of the company which the plaintiffs still hold. The plaintiffs having effected this subsequent insurance in the Globe Company and held the policy as valid in their hands, claiming all the benefits of an insurance contract from it, they were bound to give notice thereof to the defendants under the clause in their contract to which we have adverted, although this policy was voidable, if the Globe Company saw fit to set up the defense. The case falls within the very words and meaning of this stipulation in the defendants' policy. I will not enter upon a discussion of the reasons which might be assigned for the judgment which we have pronounced. A single reason is sufficient in addition to those assigned in the case above referred to, in 16 Peters. One reason why the defendants require notice of subsequent insurances upon the same property to be given to them is, that the plaintiffs may not insure the property up to its full value without their knowledge, and thereby have much less motive to preserve it from destruction by fire than they would have if they were their own insurers for a portion of its value. The fact that the plaintiffs procured this insurance in the Globe Company and paid their money for it, and held it, claiming it to be a valid insurance, and after the fire brought their action upon it, shows they regarded it as a good insurance. The effect, therefore, upon the defendants in this respect would be the same as though it were a valid policy. I am aware that the cases of *Jackson et al.* v. *The Massachusetts Mutual Fire Ins. Co.*, (23 *Pick.* 418,) and of *Stacy* v. *The Franklin Fire Ins. Co.*, (2 *Watts & Serg.* 544,) hold a different doctrine; but those cases, so far as they conflict with the views above expressed, are not to be followed. The case of *Sexton* v. *The Montgomery Co. Mu. Ins. Co.*, (9 *Barb.* 191,) and of *Wilson* v. *The Genesee Mu. Ins. Co.*, (16 *id.* 511,) which hold that notice given to the agent of the company authorized to make surveys and receive applications, &c. is a

sufficient compliance with such a clause in an insurance policy, are not applicable to the case under consideration. The requirement in the condition of the policies in those cases was general, that notice should be given to the company. The case under consideration is different. The defendants have guarded their rights, by requiring the plaintiffs to have it a part of their contract that this notice shall be given to the secretary of the company. The plaintiffs are not entitled to judgment upon their verdict, and the verdict must be set aside and a new trial granted, costs to abide the event of the action.

[Tompkins General Term, September 11, 1855. *Shankland, Gray* and *Mason*, Justices.]

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## Rogers and others *vs.* Tilley and others.

20 639
44a 21

T conveyed his property to R. by deed, in trust to receive the income and apply it, first, to the payment of his existing debts, and secondly, to the use of his wife and children during his life; and on his death, to convey the fee or capital to his children then in being. *Held* that although the absolute power of alienation was suspended, both by the nature of the trust and by the contingent remainder in favor of unborn children, yet the suspension from either cause could by no possibility continue longer than one designated life in being, and was therefore not contrary to the statute.

A trust to receive rents and profits, and apply them to the payment of debts, may be satisfied by a sale of the premises for a term of years, taking the whole rent in advance and discharging the debts; and such a sale is not contrary to the statute.

An application of rents and profits, by way of trust, to the use of a man's family, is an application of them to his use, and if confined to the period of his life, and to a living, designated individual, is not contrary to the statute.

Even if this were not so, and the use were to be considered as exclusively that of the wife and children, as it is only, in any event, for their lives, and cannot possibly last longer than the life of the father, which may be a shorter period, it is not contrary to the statute.

If any of the trusts in a deed are valid, the deed is not void. A single good trust is sufficient to sustain it.

A trust in favor of two named children of the grantor and his wife, already born, "and such as may be born of the lawful issue of" the grantor and his wife, means the existing children, and such, if any, as shall be afterwards born, being lawful issue of the grantor and his wife.

Rogers *v.* Tilley.

THIS was an amicable suit to vacate or correct a family settlement, alleged to have been drawn up by mistake in a form not truly expressive of the intent of the parties, and to be void as it stands, partly for uncertainty and partly for alleged illegality in the trusts created by it. The facts in the case sufficiently appear in the opinion of the court, which was rendered by,

ROOSEVELT, J. By the terms of the deeds in suit in this action, Tilley conveyed his property to Rogers, in trust, to receive the income and apply it, first, to the payment of his existing debts, and secondly, to the use of his wife and children, during his life; and on his death, to convey the fee or capital to his children, then in being. Such an arrangement, it is obvious—and it is the first question in the case—suspends the power of absolute alienation. The trustee cannot sell, because the trust does not authorize him to do so. The beneficiaries, or at least some of them, cannot, because as to the rents and profits, they are made inalienable by law, and because, as to the capital, the children living at their father's death, to whom it is then to belong, may be totally different from the two now born. Hence there are no persons in being by whom, as the statute expresses it, "an absolute fee in possession can be conveyed." But all suspensions of the absolute power of alienation are not prohibited. On the contrary, if restricted to two lives, they are expressly allowed; and in cases of minority, even for a possible period of twenty-one years more. In the present instance, the ownership becomes absolute on Mr. Tilley's death. The suspension is for his life, and his life only. For, although the income (subject to the debts) is to be applied "to the use of the wife and children," it is not for their lives absolutely, but "for a shorter period"—for a period at all events, which cannot be longer, but may be shorter, than the lives of the persons to be benefited. The application of the income is to be made to the use of the children during their lives, unless their father should sooner die. On his death the trust certainly terminates, also the contingent character of the future estate. From that time, the rents are to be received directly

by the children themselves, then in being, like any other owners in fee, with full power also to dispose of the estate itself, without restriction or qualification.

It may be asked, should both the present children (no others being born) die before their father, what then is to be done with the income? In the language of the statute, I answer that "not being embraced in the trust, and not being otherwise disposed of, it remains in or reverts to the person creating the trust." It would be sufficient, however, for my purpose to say that, subject to the rules of suspension as above stated, the law expressly authorizes the creation of a trust "to receive rents and profits and apply them to the use of any person during the life of such person, or for a shorter term." And I might add, if necessary, without doing any violence to the common understanding, that an application of income during a person's life, or for a shorter period, to the use of such person's family, is an application during his life, or for a shorter period, to the use of such person himself; and that an authority, therefore, to create a trust for the latter purpose necessarily comprehends the right of doing so for the former.

Next as to the application of the income to the payment of existing debts and incumbrances. The statute of trusts enumerates certain purposes "for any or either" of which—that is, for any one or more of which in the same instrument—trusts of real property may be created. Among these is, first, the payment of debts generally, and secondly, the satisfying of "any charges," as they are called, on the particular land. General debts are to be paid by "selling the land;" charges, by selling, mortgaging, or leasing it. The reason of the distinction, if any, is not obvious. Besides, "selling" lands for a term of years, as in the case of tax sales in this city, is a legally recognized form of expression used in the statutes of the state. It is a natural and suitable designation of a lease, where the whole rent, under the name of purchase money, is taken in advance; so that selling, when for a limited number of years, whether short or long, is but a mode of leasing—and leasing in some of its aspects, is but a mode of selling. Hence a trust

to receive rents and profits, and apply them to the payment of debts, is perfectly lawful. It clearly implies a trust to lease or a trust to sell a leasehold interest—both or either—taking the rent all down in advance, or receiving it from time to time, in periodical installments. The latter mode, I admit, would, in one view, be void as against creditors. But no creditor in this case complains, and no provision in the deed requires the trustee, without the consent of creditors, to lease in that mode. Besides, what prevents the trustee from making a lease with the usual reservation of rent and then selling the right to the rent? A lessor may sell his lease, as well as the lessee. In either case it is a sale of land, or, more properly speaking, of an estate in land, and nothing in the letter of the statute or in its policy, restricts the sale to a sale in fee. So far as the debts of the grantor were in the form of mortgages, the trust to lease for the purpose of satisfying them was clearly lawful and within the very words of the statute. And may not general debts when existing and acknowledged in a trust deed, and provided for by it, without any great stretch of language, be called "charges" on the trust premises? Had the grantor confessed a judgment for their payment, such judgment would clearly have been a charge; and what is the difference in principle between a confession in a deed, recorded as a deed, and a confession in a less formal certificate, recorded as a judgment? Besides, as against a mere voluntary conveyance, all the existing just debts of the grantor, especially since the code, are *quasi* charges upon the land conveyed; so much so that the conveyance as far as it obstructs their recovery if at all, is to be adjudged of no effect. This, however, is only at the instance of the creditor, if any, who complains. The statute of frauds does not make deeds delaying creditors void absolutely, but void only as against the creditors delayed—a case which this bill does not present—indeed, it does not even allege the existence of any such creditors. On the contrary, it avers that all the debts have been paid, and all the incumbrances satisfied, except a mortgage of $10,000—the holder of which can either take his pay by installments as the rents are received, or fore-

close and get the whole at once. The trust deed neither does nor could in any manner interfere with his rights. And even as to the general creditors I do not see why the deeds, if assented to by them, are not to that extent valid trust mortgages. (*See Leitch* v. *Hollister*, 4 *Comst.* 211.) The trust in favor of the two named children of Mr. and Mrs. Tilley, already born, and "such as may be born of the lawful issue of Mr. and Mrs. Tilley," although badly expressed, means the existing children, and such, if any, as should be afterwards born, being lawful issue of the grantor and his wife. At all events, there is no such insurmountable uncertainty in it as to render the trust on that ground void.

The result then is, first, that although the absolute power of alienation is suspended both by the nature of the trust and by the contingent remainder in favor of unborn children, yet the suspension from either cause, can by no possibility continue longer than one designated life in being, and is therefore not contrary to the statute. Second, that a trust to receive rents and profits and apply them to the payment of debts, may be satisfied by a sale of the premises for a term of years, taking the whole rent in advance and discharging the debts, and that such a sale is not contrary to the statute. Third, that an application of rents and profits, by way of trust to the use of a man's family, is an application of them to his use, and if confined to the period of his life, and to a living designated individual, is not contrary to the statute. Fourth, that even if this were not so, and the use were to be considered as exclusively that of the wife and children, as it was only, in any event, for their lives, and could not possibly last longer than the life of their father, which might be a shorter period, it was not contrary to the statute. Fifth, that if any of the trusts be valid—and some of them certainly cannot be disputed—the deed is not void. A single good trust is sufficient to sustain it. A decree should be entered either to dismiss the bill or to declare the legal effect of the deeds, as above stated.

[New York Special Term, September, 22, 1855. *Roosevelt*, Justice.]

20 644
25h 586

## The Ellicottville and Great Valley Plank Road Company *vs.* The Buffalo and Pittsburgh Rail Road Company.

Proof that a plank road company has, in accordance with the statute, been duly incorporated and organized, and has built its road, and procured the same to be inspected, and has erected toll gates thereon, and is in the actual use, occupation and enjoyment of the road, is sufficient to enable the company to maintain an action of trespass, for an entry upon the road, against any persons who do not show a better right to the possession of it in themselves.

Since the act of 1851, in relation to rail road companies, such companies have no right to enter upon, occupy or cross a turnpike or plank road, without the consent of the owners, except upon the condition of first paying the damages sustained by the turnpike or plank road company, after the same shall have been ascertained under the statute.

Although, by the 5th subdivision of the 28th section of the general rail road act, a rail road company is empowered to construct its road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch, this provision is to be construed as granting only the right which the public had in such streams, plank roads, turnpikes, &c. and not as attempting to grant any right to violate private property without the consent of the owners.

The maxim *de minimis non curat lex* is not an appropriate answer to an action for violating a clear legal right.

THIS was an appeal from a judgment entered in favor of the defendants, upon the report of a referee. The action was brought by the Plank Road Company, to restrain the Rail Road Company from entering upon the lands and premises of the plaintiffs for the purpose of constructing their rail road at the points mentioned in the complaint, and from removing the planks and grading from the plaintiffs' premises; and from depositing, within the premises of the plaintiffs, materials for the construction of the rail road; and from running locomotives and cars upon and over the plaintiffs' plank road, at the places and points mentioned; and to recover damages for injuries already done.

The defendants, by their answer, denied all the facts stated in the complaint. And for a further answer to the complaint, stated, 2d. That the places and routes claimed by the plaintiffs for their plank road are a *public highway*, and were so at the

time the defendants were said to have entered on the same; and that the defendants' rail road necessarily runs along the line of the highway, and that the defendants had carried the highway over the track of their rail road, at the points mentioned, and had restored the highway to its former state, and had not unnecessarily impaired its usefulness. 3d. That the track of their rail road necessarily crosses and runs along and upon the plank road; that at the points mentioned in the complaint the defendants had carried the plank road over the rail road, and had restored the plank road to its former state, so as not in any manner to have impaired its usefulness, but had left the same in as good condition as it formerly was before the track of the rail road was constructed. The action was referred to a sole referee, for trial and determination. The referee, after the hearing before him, reported in substance the following facts. That in the year 1850, the plaintiffs duly filed articles of association, in the office of the secretary of state, and procured themselves to be duly incorporated, organized and formed into a company for the purpose of building a plank road, from the village of Ellicottville through the town of Great Valley, to Great Valley station on the New York and Erie Rail Road, in the county of Cattaraugus. That in pursuance of such organization, the said company went on and built and completed their said plank road, in the year 1851. That the road was located by the company and built along and upon the highway, through the town of Great Valley, at the points where the trespasses mentioned in the complaint in this action were alleged to have been committed; and that, prior to the building of the plank road, the same had been used as a public highway for the period of twenty-one years and upwards. That James Nelson, at and prior to the formation of the plank road company and the making of the road, was the owner and occupant of the land, on both sides of the highway. That previous to the building of the plank road, the company *did not* procure the consent of the commissioners of highways of the town of Great Valley, nor of two-thirds of the inhabitants residing on the line of the road, nor had they, at any time since, done so. That prior to the time of the alleged tres-

passes, and after they had built their road, the plank road company had, in accordance with the statute, procured the road to be inspected, and had erected toll gates thereon, and were in the actual use, occupation and enjoyment of the same.

The referee further found and reported, that the defendants were duly organized as a rail road company, on the 7th day of October, 1852, for the purpose of building a rail road from the city of Buffalo to the New York and Erie Rail Road in the county of Cattaraugus; and that it became and was necessary for them to build on and across the said plank road in the said town of Great Valley, at the points where the said plank road was constructed, and upon the highway through the lands occupied by the said James Nelson; and that the defendants did, without the consent of the plank road company, enter upon the same at the places aforesaid, tear up the planks, and grade the land for the purpose of laying down a track thereon, which was the same trespass and injury mentioned in the complaint in this action; and that the injury done to the road of the plaintiffs by tearing up the plank road was only nominal, and no more than was necessary to enable the defendants to grade their road for the purposes aforesaid.

From the foregoing facts the referee found and reported the following conclusions of law: That at the time of the commencement of this action, the plaintiffs had not any title to or right in the land or premises where the alleged trespasses were committed, and that the plaintiff could not recover; and that a judgment must be entered for the defendants, that they recover their costs against the plaintiffs in this action.

Upon this report a judgment was entered, that the plaintiffs take nothing by their said complaint, and that the same be dismissed; and that the defendants do go thereof without day. And it was further adjudged, that the defendants should recover of the plaintiffs the sum of $63.34, adjudged to the defendants for the costs and expenses of this action, and that they have execution therefor.

The appeal was argued in this court by

*Harrington & Lamb*, for the appellants.

*A. G. Rice*, for the respondents.

*By the Court*, MULLETT, J. This was an action brought by the plank road company to recover damages from the rail road company, for a trespass committed by them, by entering upon the plank road, tearing up the plank and grading and depositing materials for the rail road within the bounds of the plank road; and for an injunction against the rail road company to restrain them from proceeding with the construction of their rail road on and across the plank road, until they had procured the damages to be assessed and paid. Upon the trial, it was proved, and the referee found and reported, that the plank road company was duly incorporated and organized in 1850, and that they went on and built their road in 1851. That prior to the alleged trespasses by the defendants, the plank road company had, in accordance with the statute, procured their road to be inspected and had erected toll gates thereon, and were in the actual use, occupation and enjoyment of the same. This was abundantly sufficient to enable the plaintiffs to maintain an action of trespass for an entry on their plank road, against any persons who did not show a better right to the possession of it in themselves.

The referee, therefore, erred in deciding, that, at the time of the commencement of this action, the plaintiffs had not any title to, or right in the land and premises, where the alleged trespasses were committed, and that the plaintiffs could not recover therein, on that account. But it appeared on the trial before the referee, and also on the argument of the appeal before us, that the defendants claimed, that, as a rail road corporation, they had a right to enter upon the plaintiffs' plank road, and construct their rail road upon and across it, without, or before, causing the damages sustained, or to be sustained by the plank road company, to be assessed or paid; which is denied by the plain-

tiffs, and this presents the most important question between the parties.

The defendants, as a rail road company were incorporated and organized under the act to authorize the formation of rail road corporations, and to regulate the same, passed April 2d, 1850, commonly called the general rail road act. (*Laws of* 1850, *p.* 211.) By the fifth subdivision of the 28th section of which act, it is provided, that every corporation formed under that act, in addition to certain other specified powers, shall have power to construct their road across, along and upon any stream of water, water-course, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch; but that the company shall restore the stream or water-course, street, highway, plank road or turnpike thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness. This provision of the statute was copied from the 5th subdivision of the 19th section of the act of 1848, on the same subject; and that, so far as it relates to crossing streams of water, water-courses, roads and highways, was taken from the 11th section of the act to provide for the construction of a rail road from Auburn to Rochester. (*Sess. Laws of* 1836, *p.* 493.) This statute has not been and cannot be so construed as to authorize a rail road corporation to enter upon and permanently occupy or seriously to injure a turnpike or plank road company who hold and enjoy their franchises and property under an authority of the legislature, equally valid and sacred as that which confers similar rights and privileges on rail road companies. On the contrary, this section is a clear manifestation of a legislative intention to protect the rights of turnpike and plank road corporations against intrusion and violence, by rail road companies. Rail road companies are authorized to intersect or touch them only on condition that they shall not unnecessarily impair their usefulness, to the owners. The inviolability of private property, whether belonging to individuals or private corporations, against the intrusion of rail road corporations, is strongly asserted and clearly illustrated by the supreme court in the cases of *Fletcher* v. *The Auburn and Syra-*

*cuse Rail Road Co.*, (25 *Wend.* 462;) *The Trustees of the Presbyterian Society in Waterloo* v. *The Auburn and Rochester Rail Road Company*, (3 *Hill*, 567,) and the case of *The Seneca Road Co.* v. *The Auburn and Rochester Rail Road Co.* (5 *Hill*, 170.) The legislature could not give, and it is not to be presumed that they intended or attempted to give, to this rail road company a right to enter upon the plaintiffs' road and in any way to impair its usefulness or diminish its value, without making or becoming liable to make the plank road company just compensation.

The obstacle heretofore considered as existing in the way of a rail road company acquiring a right to run their rail road across a turnpike or plank road, consisted in the want of power to acquire the privilege desired, except by agreement. The statute authorizing a rail road company to acquire the *title* to real estate wanted for the road, by the special proceedings pointed out by the statute, was not considered applicable to cases where the *title* to the real estate was not to be taken, but only a partial privilege of using it, which did not divest the owners of their title, but only occasioned them some damage, which the rail road company had no power to compel them to surrender. This construction of the statute was in harmony with the legal doctrine of the inviolability of private rights, but was not in accordance with the enterprise and improvements of the age. That a turnpike or plank road, though owned by individuals and used as private property, might be extended through an important section of the state, and through its whole length intercept and cut off the far more important transits of rail roads, or be the occasion for demanding an exorbitant price for crossing them, is a consequence probably not foreseen at the time of the incorporation of these turnpike and plank road companies. It is true, that by the 5th subdivision of the 28th section of the general rail road act, a rail road company is empowered to construct its road across, along or upon any stream of water, water-course, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch; but this statute is construed as granting only the right

which the public had in these streams of water, water-courses, streets, highways, plank roads, turnpikes and canals, and not as attempting to grant any right to violate private property without the consent of the owners; and this construction is sustained by the doctrine of *noscitur a sociis.* (*Burrill's Law Dict. part* 2, *p.* 756. 3 *Term Rep.* 87. 1 *B. & C.* 644. 13 *East*, 531. *Broom's Legal Maxims*, 294.) The same reluctance in the legislature to violate individual property, or take it, or authorize another to take it, without the consent of the owner, or making compensation to him for it, is manifest in the 24th section of the general rail road act of 1850. The legislature provided for what might, in many cases, be considered an adequate compensation for crossing a turnpike or plank road, but they have not said so, nor compelled the owners to take it as such. By the 18th section of the general rail road act, it is declared that all real estate acquired by any company under and pursuant to the provisions of that act, for the purposes of its incorporation, shall be deemed to be acquired for public use. This is, in substance, but a legislative recognition of the doctrine laid down by the chancellor in the case of *Beekman* v *The Saratoga and Schenectady Rail Road Co.*, (3 *Paige*, 45,) and practiced upon ever since. This is the principle upon which rail road companies are authorized to take private property for the use of their rail roads, upon paying a compensation ascertained in the manner provided by the statute; but it cannot authorize them to trespass upon the lands of others which they do not take, and for which they pay no compensation, which it must do if it authorizes them to enter upon the land and appropriate it before ascertaining and paying the compensation. By the 4th section of the act of 1851, in relation to rail road companies, a rail road company which shall occupy or cross a turnpike or plank road, is made liable to pay such turnpike or plank road company all damages which it may sustain by reason of such occupancy or crossing; the damages to be ascertained and *paid* in the same manner as is provided by law for the assessment and *payment* of damages in cases of taking private property for the use of rail road companies. (*Sess.*

*Laws of* 1851, *p.* 21.) The law to authorize the formation of rail road companies, and to regulate the same, passed in 1850, after pointing out the manner in which a rail road company shall proceed to ascertain the damages to be paid for the real estate to be taken for its use, declares that a certified copy of the order to be made on that occasion, shall be recorded at length in the clerk's office of the county in which it is situated; and that, thereupon, and on the *payment or deposit*, by the company, of the sums to be paid for the land &c. the company shall be entitled to enter upon, take possession of, and use the said land for the purposes of its incorporation. (*Sec.* 18.) Whatever may have been the claim of rail road companies, before this statute, to a right to enter upon, occupy or cross a plank road without being liable for the damages occasioned by them, since the act of 1851 they have no such right, but can occupy or cross a turnpike or plank road, without the consent of the owners, only upon the condition of first paying the dam ages sustained by such turnpike or plank road company, ascertained under the statute. This construction of the 4th section of the act of 1851, is in harmony with the spirit of our constitution; with the principles so uniformly asserted and maintained by our judiciary; with the sentiments which have generally governed our legislature; with the just and magnanimous policy which dictated the law, and with the language of the statute to which it was assimilated.

The referee also erred in finding and reporting that the injury done to the road of the plaintiffs by tearing up the planks, was only nominal. He might have found the damages as small as the truth or facts would justify, but the maxim *de minimis non curat lex* is not an applicable answer to an action for violating a clear legal right.

The judgment appealed from must be reversed; the report of the referee set aside, and a new reference to the same or some other referee, ordered.

Judgment reversed.

[Erie General Term, November 14, 1855. *Bowen, Mullett* and *Greene* Justices.]

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THE PEOPLE, *ex rel.* EZRA B. BOOTH, respondent, *vs.* JOHN FISHER, appellant.

The 5th section of the "act for the prevention of intemperance, pauperism and crime," passed April 9th, 1855, does not, either in terms or by just or fair implication, restrict the power of courts of special sessions, in respect to offenses under that act, to cases where the party charged either requests to be tried by such court or omits to give bail. On the contrary, it seems to contemplate that the justice or other officer before whom the accused shall be brought by virtue of the process, shall proceed at once to the trial of the charge.

Not only is the power conferred upon the magistrate to try the accused, but he is imperatively required to hold a court of special sessions, and proceed to the trial as soon as the complainant can be notified. Neither his power, or his duty to try, are made to depend upon the defendant's request to be tried, his omission to give bail, or any other condition.

The magistrate may therefore proceed to the trial of the accused, notwithstanding the latter offers to give bail for his appearance at the next criminal court having cognizance of the offense.

Section 2 of article 1 of the constitution, which declares that "The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever," was not intended to apply to such a case.

The expression "the trial by jury," as used in that section, refers as well to all other incidents of the trial as to the number of men necessary to constitute the jury; and means such a trial as is contemplated by section 6 of article 1 of the constitution, for persons charged with capital or otherwise infamous offenses; which must be upon presentment or indictment of a grand jury, and in a court of record with common law jurisdiction.

All offenses which are not capital or otherwise infamous crimes, are left under the regulation of the legislature, in regard to trial by jury.

CERTIORARI to the county judge of Monroe county. On the 9th day of August, 1855, the appellant was brought before S. W. D. Moore, Esq. police justice of the city of Rochester, upon a warrant issued by said justice, charged with a violation of the act entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9th, 1855. On being brought before the justice, he offered to give bail for his appearance at the next criminal court having cognizance of the offense. The justice was satisfied with the responsibility of the bail so offered, but refused to receive it, or to take any bail. Thereupon, on the 11th day of August, 1855, the appellant presented his petition to H. Humphrey, Esq. county judge, &c.;

and obtained the allowance of a writ of *habeas corpus*, in order to be let to bail and be discharged from custody. On the same day the officer made return to said writ, and the same was traversed by the affidavit of the appellant, and issue was joined thereon. On this issue evidence was taken to contradict the return. After hearing the case, and arguments of counsel, the county judge decided not to let the defendant to bail, and ordered him to be remanded into the custody of the police constable, to be tried before a court of special sessions. On the 17th day of August, 1855, the defendant sued out a writ of certiorari, removing the proceedings and adjudication of the county judge into this court to be reviewed.

*Henry Hunter*, for the defendant.

*J. B. Stebbins*, for the people.

*By the Court*, WELLES, J. The fifth section of the act entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9th, 1855, is in the following words:

"§ 5. Every justice of the peace, police justice, county judge, city judge, and in addition, in the city of New York, the recorder, each justice of the marine court, and the justices of the district courts, and in all cities where there is a recorder's court, the recorder, shall have power to issue process, to hear and determine charges, and punish for all offenses arising under any of the provisions of this act; and they are each hereby authorized and required to hold courts of special sessions for the trial of such offenses, and under this act, to do all other acts and exercise the same authority that may be done or exercised by justices of the peace in criminal cases, and by courts of special sessions as the same are now constituted; and the term magistrate, as used in this act, shall be deemed to refer to and include each officer named in this section. Such court of special sessions shall not be required to take the examination of any person brought before it upon charge of an offense under this act, but shall proceed to trial as soon thereafter as the complainant can

be notified; and for good cause shown he may adjourn from time to time, not exceeding twenty days. At the time of joining issue and not after, either party may demand a trial by jury, in which case the magistrate shall issue a venire and cause a jury to be summoned and empanneled, as in other criminal cases in courts of special sessions. The complainant may appear upon such trial upon behalf of the people, and prosecute the same with or without counsel. He may also prosecute the same in all the courts to which, as hereinafter provided, appeal may be taken by attorney, or he may apply to the district attorney, whose duty it shall be upon such application to appear and conduct said appeal from the judgment thereon. The same costs and disbursements shall be allowed against the defendant upon such appeal as are now allowed in civil actions, in those courts to which appeal may be taken according to the provisions of this act. In all cases, if the district attorney shall appear and conduct the trial or appeal, or both, the costs, if any, shall go to him for his individual use; in other cases to the complainant; and in default of the payment of the whole or any part thereof, the defendant may be committed to the same extent as provided in the fourth section of this act."

By this section the several officers therein enumerated are invested with the same powers in relation to offenses under the act of which it constitutes a part, with which justices of the peace are clothed in criminal cases, and are each required to hold courts of special sessions with the same powers in reference to such offenses as courts of special sessions possessed, as they were constituted when the act was passed, in reference to cases within their jurisdiction.

By the revised statutes the powers of courts of special sessions are confined to cases where the party charged with an offense requests to be tried before them, or, where he shall not so request, but shall after being required, omit for twenty-four hours to give bail for his appearance at the next criminal court having jurisdiction, &c. (2 *R. S.* 711, §§ 5, 23.) But the section of the prohibitory act referred to, does not, as the revised statutes do, restrict the power of the courts of special sessions to cases

where the party charged either requests to be tried by such court or omits to give bail. It certainly does not do so in terms, nor, as I think, by just or fair implication; but on the contrary it seems to contemplate that the justice or other officer before whom the person charged shall be brought by virtue of the process, shall proceed at once to the trial of the charge. Power is expressly conferred upon the officers mentioned to issue process, to hear and determine charges and punish all offenses against the provisions of the act; and for that purpose they are each authorized *and required* to hold courts of special sessions for the trial of such offense. Such court is not required to take the examination of any person brought before it upon charge of an offense, "*and shall proceed to trial as soon thereafter as the complainant can be notified.*" The section then proceeds to give directions respecting adjournments, and provides for a jury on the demand of either party, if applied for at the joining of issue. It then concludes with some regulations and provisions respecting appeals from judgments of the courts of special sessions provided for in the 8th section of the act, and the costs on such appeals.

It will be perceived not only that the magistrate has conferred upon him the power to try the persons charged, but that he is imperatively required to hold a court of special sessions, and proceed to the trial as soon as the complainant can be notified. Neither his power or duty to try is made to depend upon the defendant's request to be tried, his omission to give bail or any other condition. That the power of courts of special sessions, in the cases provided for in the revised statutes, is thus limited and dependent, and in the act under consideration, acts which, before its passage, were innocent to the eye of the law, are made misdemeanors, their punishment defined, these tribunals erected and provided expressly for their trial and punishment, with directions concerning their manner of proceeding, and no mention made of any such condition or restriction of their powers, is strong evidence to my mind that none such were intended to be imposed. Instead of the conditions provided in the revised statutes, these courts, in cases arising under this act, are direct-

ed to proceed at once to the trial of the persons charged with violations of its provisions.

It is contended, however, in behalf of the appellant, that if the intention of the act was to compel the person arrested by virtue of the process issued by a magistrate, to be tried before a court of special sessions, without the right on his part to be released from custody upon giving bail to appear at the sessions, the act is so far in contravention of section two of article one of the constitution which declares that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." I entertain no doubt that by the words "trial by jury" as there mentioned, was intended a common law jury, which consists of twelve men. But I am satisfied it was not intended to apply to a case like the present.

Section six of the same article provides that "no person shall be held to answer for a capital or otherwise infamous crime, (except in cases of impeachment and in cases of militia when in actual service, and the land and naval forces in time of war, or which the state may keep with the consent of congress in time of peace; and in cases of petit larceny under the regulation of the legislature,) unless on presentment or indictment of a grand jury," &c. The framers of the constitution have here declared that persons charged with capital or otherwise infamous crimes, shall not, with certain exceptions, be held to answer therefor, except by indictment or presentment of a grand jury; clearly, as it seems to me, leaving all other cases under the regulation of the legislature. Persons charged with crimes not capital or otherwise infamous, may therefore be held to answer without being first indicted or presented by a grand jury, as the legislature shall provide.

But it is said that in whatever court the person charged may be tried, and whether with or without being presented by a grand jury, he is, in any event, entitled to have his guilt or innocence determined by a jury of twelve men. The several written constitutions of this state, those of 1777, of 1821, and of 1846, contain substantially the same provisions as those above referred to. By section four of the act declaring the powers and duties

of justices of the peace, passed April 13th, 1813, (2 *R. L.* 507,) petit larceny, misdemeanor, breach of the peace, or other criminal offense under the degree of grand larceny, was triable by a court of special sessions, and *that* without any jury whatever This continued until 1824, when the legislature so far modified it as to give the party accused the right to be tried by a jury of six men. (*Laws of* 1824, *ch.* 238, § 47.) By the revised statutes, the causes triable by courts of special sessions are mentioned, and are contained in eight specifications, all being below the degree of grand larceny, and none of them being what would be denominated infamous in the sense of the constitution, except petit larceny. (2 *R. S.* 711, § 1.)

The section of the constitution which, it is claimed, secures to the appellant a trial by a jury of twelve men, uses the expression "*the trial by jury.*" This refers as well to all other incidents of the trial as to the number of men necessary to constitute the jury. It means, as I think, such a trial as is contemplated by section six, for persons charged with capital or otherwise infamous offenses, which must be upon presentment or indictment of a grand jury, and in a court of record with common law jurisdiction. I think this is apparent from several considerations:

1. A common law jury trial can only be had in a court of common law jurisdiction, both as regards the character of the court, and its mode of procedure. It is not true that simply making the jury to consist of twelve men, constitutes a common law jury trial.

2. Section six excepts from its operation petit larceny, which at common law was felony, infamous in its character. The statute of 1813 and the revised statutes referred to, expressly authorized courts of special sessions to try for that offense, which was never held to be in contravention of the constitution. (*Murphy* v. *The People*, 2 *Cowen*, 815. *The People* v. *Goodwin*, 5 *Wend.* 251.)

3. The 2d and 6th sections referred to, are parts of the same articles of the constitution, and are *in pari materia;* the latter, securing to all persons charged with infamous crimes excepting

as aforesaid, a trial after due presentment or indictment by a grand jury, leaving the trial of all cases of misdemeanor on the footing of petit larceny, to be provided for by the legislature by a jury of six, twelve or any other number, or without a jury

4. No jury trial in criminal cases was ever known to the common law, but such as followed upon indictment in a common law court, after the accused was in custody, had been arraigned and had pleaded to the indictment.

5. This construction makes the two sections harmonious and sensible. The legislature may declare criminal, acts which were before innocent, as in case of the statute under consideration. How can it be said that in such cases a jury trial has been heretofore used? Section two is expressly limited to cases in which the trial by jury has been heretofore used. In cases of acts made criminal by a statute passed after the adoption of the constitution, no trial either with or without a jury has been used. But if an act is made a felony by statute and thereby becomes infamous in its character, as in the cases of the statutes to prevent abduction of females for purposes of prostitution, and to prevent seduction, section six secures to the person charged with its violation a trial by jury, after due presentment by a grand jury.

Section two only requires a trial by jury in cases where it has been heretofore used. This cannot mean cases where it might or might not be required, for then no misdemeanor could be tried by the special sessions, as every person charged with any crime was liable to be indicted therefor by the grand jury, and then a trial by jury was the only one which could follow. The only practicable interpretation is to exclude from its operation those cases where it was competent to try by a court of special sessions, and where such trials had been in use. By the revised laws of 1812, before cited, all offenses under the degree of grand larceny might be tried in those courts, and that law continued in force until 1830, when the revised statutes limited the jurisdiction of courts of special sessions to certain specified cases. The constitution has been twice revised since 1813, and the provisions on the subject have been continued, substantially

the same as they were before 1813. It would be singular, not to say absurd, if the organic law is to vary in its principles, and the objects to which it relates, at every change of legislation It should be interpreted in this respect in the same way as if there had been no revision since 1777. The fact that the same thing has been twice asserted since that time in the same solemn manner, certainly ought not to change the interpretation justly applicable to it originally, but on the contrary, should confirm such interpretation.

For the foregoing reasons, I am of the opinion that the decision of the county judge was correct, and should be affirmed.

Judgment affirmed.

[Monroe General Term, December 3, 1855. *Johnson*, *Welles* and *Selden*, Justices.]

# APPENDIX.

## JUDGE BARCULO.

THE following biographical sketch of the late Judge BARCULO has been kindly furnished by JOHN THOMPSON, Esq. of the Poughkeepsie bar, an intimate friend of the deceased. It pays a feeling and appropriate tribute to the memory of one who adorned the bench, and graced the social circle. But few purer-minded or clearer headed men than Judge BARCULO ever occupied a judicial station.

"Hon. SEWARD BARCULO, late justice of the supreme court for the second judicial district, died in the city of New York on the 20th day of June, 1854, after a painful and lingering illness, which he suffered with manly fortitude and christian resignation. It is due alike to his memory, and the position which he held at the time of his decease, by the suffrages of the people, that some notice should be taken of his life and services. It is one of the consolations of a good man, that his memory shall not die; that the remembrance of his services and virtues shall be preserved, as an inheritance to his children, and an incentive to others, who may be treading the arduous paths of public toil and trust.

The sentiment which seeks its gratification in the desire of honest fame while we live, may legitimately be extended to posthumous renown. It is a premonition and prophecy that we are not all mortal, but that something survives and claims a consciousness of the character it leaves behind.

Seward Barculo was the son of Rev. George Barculo, who, at the time of his son's birth, on the 22d day of September, 1808, was pastor of the two churches of Hopewell and New Hackensack, in Dutchess county. The child was an early favorite of his uncle Jacobus L.

Swartwout, with whom he spent much of his time, and who subsequently adopted him and provided for his education. As a boy, he was remarkable for the active, though mischievous turn of his mind, while at the same time he was truthful and generous, fearless and firm. He had a quick and retentive memory, and committed his lessons with rapidity and ease. He was designed for a farmer, and was sent to a district school, but his uncle observing that his leisure moments were spent in the study of algebra and mathematics, changed his plans in regard to him, and concluded to give him a liberal education.

He commenced his academic course in December, 1826, at the age of 18, at the academy in Fishkill village, then under the charge of the Rev. Cornelius D. Westbrook. His health, so robust while on the farm, failed the next spring, and he was obliged to travel, and study at home, reciting to Rev. E. Price, four miles distant, riding over twice a week. In the fall of 1827, he accompanied his early friend and teacher, W. W. Andrews, to the home of his father in Cornwall, Conn. where he fitted for college and entered the freshman class at Yale, September, 1828. He remained there until August, 1830, and then left with many others, owing to some difficulty with the faculty. He however received an honorable discharge, and entered Rutger's College, New Jersey, where he remained three months, and returned home, the studies at Yale being a year before those at Rutger's. The faculty were displeased at this step and expelled him. He went back to college all unconscious of what had taken place in his absence, and refusing to make an apology, he did not graduate, and commenced the study of law in the office of S. Cleveland, Esq. in Poughkeepsie, where he continued, (except a year's absence at a law school) until he was admitted to the bar in the spring of 1834, in his 26th year. From the first moment when he commenced the study of the law, he determined to take no second rank in the profession, and therefore sought not only to perfect himself in the elements of legal science, so as to become an accurate and logical pleader, but to accomplish himself as a skillful *advocate*. He looked to this field as the highest sphere of legal effort, regarding the intellectual contests of the bar as displaying greater resources, and loftier qualities, mental and moral, than any other department of the profession, often remarking to his associates, 'Learn to speak—argue—debate. Without this you can never make yourself felt.' And his own practice was fully up to the spirit of this advice. Into every debating school, moot court or club, where mind comes into collision with mind, he went. Law, literature, science, politics, social and national questions, were all propounded and

discussed in these humble forums, with a force and ability not often surpassed upon a wider arena, and in more public councils. Nor were these transient impulses; but pursued diligently year by year, no matter how urgently other engagements might press upon his time. He was not naturally a fluent or easy speaker. At this stage of his education, his manner was not graceful, nor his method rapid, and it was only after repeated and constant preparation, that he acquired that ease and dignity of manner, and that calm and logical accuracy of statement and argument, which ultimately made his charges to a jury so clear and convincing. He had none of the usual folly of students in respect to the power of genius *without diligence*, but relied on his careful investigation of every subject that came before him. The bar of Dutchess county had just before this furnished some of the finest examples of judicial talent then in the state. The late Judge Emott had recently retired from the bench of the supreme court, full of years and honor, leaving an example to his successors worthy of all imitation, and which the Hon. C. H. Ruggles, appointed in his place, did not fail to emulate; whose kind, impartial and generous administration, endeared him to every member of the bar with whom he came in contact.

Elisha Williams, with his portly person, splendid flashing eye, and silvery hair gathered in a queue, and falling behind; with his melodious and all-magical voice, had left the impress of what he *said* and *did* upon the hearts and minds of all who thronged to hear him, at almost every circuit then held in this county.

Ambrose L. Jordan, then in the height of his early career, graceful in person and mind, with his ruddy complexion, rich black hair, and towering pile of forehead, ample and massive, beneath which flashed an intellect sharpened by contact with Elisha Williams and Martin Van Buren, and men of that character and stamp. These were visitors from Columbia.

Thomas J. Oakley was an indigenous plant; sturdy as an oak, strong, simple, grand; he passed along the line of 'his great argument,' convincing by the unanswerable chain of his compact logic, and breaking away like an inundating stream, through the amplitude of its quiet waves, those embankments of his adversary, which a more dashing onslaught might not have shaken.

James Tallmadge, quick, nervous and keen, commanding the attention of every eye by his lofty port; his luxuriant hair, curling in masses over his temples; and his changing countenance, keeping play with every emotion of his soul; and hurling his keen invective right

and left, overwhelming his antagonist with the power of his brilliant and rapid sallies.

Philo Ruggles, always sound, sensible and safe.

Stephen Eno, a true specimen of the old school lawyers, with knee buckles, high topped boots, and green bag, thoroughly read in the principles of the common law, and who, before the days of Kent and Story's commentaries, perused all the ancient solid works of legal science, even Wood's Institutes and Fearne's Contingent Remainders, for the love of it, a practice continued to his dying day.

Most of these men were just passing away; like a moving constellation composed of many stars, they were sinking gradually and gracefully out of view, for their day and mission was over. But the student caught the vision of their glory, and felt his heart beat quicker as he surveyed the eminences they had so nobly won. Those who remained were not unworthy to be set as examples.

Henry Swift stood foremost among these. Acute, subtile, indefatigable; his keen, analytical grasp held like the grip of death to his cause, and often brought it forth triumphant, when the spectator felt that the battle was lost. With astonishing facility he mined through a world of business, and won laurels and wealth for himself and family. May he long live to enjoy them, and his green old age be as peaceful as his life has been full of professional conflicts. He was a generous and candid foe.

Stephen Cleveland, with whom Judge Barculo commenced his professional studies—'*the long headed*,' as he was sometimes called—whose meditative and comprehensive genius sought to fathom the philosophy of law; who was never satisfied without reaching the *ultimate* reason; who looked with a noble disdain upon all the caviling and trickery of a pettifogging practice, being honor's self personified. His tall form and bald crown were then prominent in all contests of the bar.

Robert Wilkinson, then just succeeding his brother-in-law, T. J. Oakley, in his office, having moved back to his native county, and feeling for a secure footing among his competitors, and flashing out in occasional splendor before court and jury in his able presentation of the facts of his case; commanding admiration by the force, eloquence and earnestness of his argument.

Charles Johnston, his pale countenance full of legal enthusiasm, and his industry making amends for his feeble constitution.

Alas! Of the above list, most have passed away; they move in spectral review before the eye of memory, and are forgotten by the generation now rushing into the places they filled. There were also

James Looker, N. P. Tallmadge, R. D. Davis, Alex. Forbus, Maison, and others then at the bar. Among the associates of Judge Barculo, or just behind him were C. W. Swift, Wm. Wilkinson, John Thompson, H. D. Varick, Wm. Eno, and at a later day James Emott, E. Q Eldridge, James H. Weeks, J. B. Jewett, Gilbert Dean, and others, now at the bar in Dutchess county.

Judge Barculo came to the bar under circumstances which, though generally deemed favorable, are in reality a disadvantage to a young man anxious to commence the trial of causes at nisi prius. He entered into partnership with Mr. Cleveland, who was then doing an extensive and lucrative business, whose clients were always anxious that he should personally try their causes. By the interest, however, which the junior partner took in cases, and the *thorough manner of his preparing them* for trial, he rapidly acquired confidence, and began to try his wing unaided by senior counsel, and although he was not remarkable for brilliancy or polish, yet he clung to his points, when taken, with great tenacity and success.

The writer of this well remembers, at about this period, the case of *The People* v. *Benschoten*, who was indicted for a libel on one of our most worthy citizens, owing to the peculiar nature of the publication and the circumstances of the parties, great interest was excited—the court room was crowded—Judge Ruggles presiding at the oyer. The complainant, to insure a conviction, had secured the services of all the most eminent counsel then at the bar to assist the district attorney, Swift, Johnson, Wilkinson, Eno, an array crowding two tables, while at the corner of one of them sat Barculo alone, with his client cowering at his side. While the jury were being empanneled he said not a word, nor moved a muscle, his hair thrown negligently over his brows, his eye resting on the paper in his hand, and his lip (his decisive feature) rigid and compressed. Hon. J. W. Brown and some others occupied the bar. At the proper moment he rose and moved to quash the whole indictment, consisting of three counts. The opposite counsel read and re read their copies, and smiled to each other. But as Barculo proceeded to take to pieces and examine separately every averment and innuendo, and apply the principles of criminal pleading to every part, they found he had unhorsed the whole array, and tried to answer him in vain: the indictment was quashed, and he left the court room a victor. About this period his partner was much in New York, and Barculo gradually assumed the business of the office, with credit to himself and satisfaction to his clients. He was employed with Mr. Swift and Judge Buell of Troy in the celebrated

case of *Lansing* and *Russell*, tried by Mr. Webster and Samuel Stevens at the Dutchess circuit. It excited much interest on account of the eminence of the counsel and the importance of the questions involved. The testimony occupied about a week, and after its close, Stevens sat up all night to arrange his argument; he occupied the court the whole morning, and so minute and thorough was his argument that Mr. Webster, after laying aside paper after paper which he had prepared for summing up to the jury, at last said to the writer, after throwing down his last sheet, '*Stevens has left me nothing to say; nothing!*' But he did say something, and in manner that no other man could imitate or rival, gathering up all the little threads of his case and twisting them skillfully into a cable, that no weight of opposing logic could break. It was under the impression made by the great argument of Webster, that Barculo rose to address the jury. He was calm and self-possessed. Every thing was arranged with the nicest care, point after point was stated and fortified, until warming with his theme, and defiant of the crushing force of his legal adversaries, he exclaimed—'Gentlemen, the defendant relies upon his counsel and not upon his facts. In his extremity he has called upon the gods, and Jupiter Tonans is here! (pointing to Webster,) but if here, it is evident there is *work* to be done, which no power but that of Jupiter can accomplish! I trust the times are past when law and justice are to rise or fall obedient to the Thunderer's nod.'

Barculo at this time was in the habit of attending the general term of the supreme court, and taking cases from other attorneys to argue there. He was very sincere in his admiration of Judge Bronson, and thought him a model judge, and used to say frequently after his first visit to Europe, at which time he frequented the English courts, that they had no judge there in law or equity equal to Bronson, and that his opinions were more highly valued in Westminster Hall than at home! He was appointed first judge of the county court in Dutchess county, in April, 1845, by Gov. Wright, upon the unanimous recommendation of the Dutchess county bar, who without distinction of party acknowledged his peculiar fitness for that position and prevailed on him to accept it. That court immediately felt the benefit of his prompt application to business, its accumulated certiorari calendar was quickly cleared, and in the sessions and in the trial of civil actions he soon gave indications that he had fallen into his proper sphere. On the resignation of Judge Ruggles in 1846, he was appointed circuit judge, by Gov. Wright. The commission as circuit judge had been previously sent to Hon. Selah B. Strong, now one of the justices of

the 2d district, who not only declined the appointment, but magnanimously recommended the bestowal of the office upon Judge Barculo, with whom he was then but slightly acquainted, but of whose fitness and capacity for that position he had formed a high estimate, and who has since expressed the gratification he felt in knowing how fully his anticipations were realized. He entered upon this new sphere of duty with modesty and diligence, yet with a firmness and dignity not usual for one of his age. He felt the delicacy and difficulty of occupying a seat recently filled by Ruggles and Emott, judges so widely known, and universally esteemed, and under whose administration the bar of the 2d district had witnessed high models of judicial excellence and learning. It is sufficient to say the robe worn by his predecessors was neither sullied nor disgraced on his shoulders. He soon developed those qualities of mind, for which he afterwards became somewhat remarkable, to wit, an almost intuitive insight into the heart of the case before him, and of the principle of law or equity, by which it was governed. No ingenious statement of counsel—no round about presentation of the facts—no sophistry of argument, could baffle the quick comprehension with which he sifted out at once the vital from the unimportant, and discriminated the marrow and core of the case from its inconsequential concomitants. The quickness and vigor of his mind in this respect was almost immediately put to the test in the case of the *The People* v. *Bodine*, which came on for trial at the Orange circuit in —— 1846, having been twice before tried in New York. Some of the most eminent counsel in the state were engaged in the case, and every point was contested with a zeal and pertinacity not often witnessed. David Graham, jr., acute and clear, though refining, plain in statement, fertile and rich in imagery and illustration, brought the wealth of his learning, and the vehemence of his zeal to the prisoner's defense. John W. Brown, now justice of the supreme court, sat by his side. Bold, logical and enthusiastic, he seized with unerring grasp upon every point and principle, lifted them out of the elements that concealed them, and made them stand forth revealed and luminous to every eye; nothing escaped the logical grasp of his mind, or withstood the force of his vigorous onsets. James R. Whiting, versed in all the technology of criminal law, watching with astute and wakeful attention every opening in the joints of his adversary's harness, and ready to spring with every advantage on his foe.

It was before such men, and surrounded by minds so vigorous and accomplished, and in a cause so momentous (a trial for life!) that he was called to preside for the first time, and so ably did he dispose of every

objection, so nicely did he discriminate between the specious and the sound, the plausible and solid, so fairly did he present the case to the jury, that all parties were not only satisfied, but loud in the expression of their praise. He justly merits what Shiel says of Bushe, 'He had the art of exposition and the elucidating quality, so important in the conduct of ordinary affairs; the power of simplifying in the highest degree, he evolved with a surprising facility the most intricate facts from the most embarrassing complication, and reduced in a moment a chaotic heap of incongruous materials into symmetry and order.' His most arduous duties at this time, lay in what he was called to do as vice chancellor. The second district embraced a vast variety of chancery business, its commercial wealth and population were rapidly augmenting, and the vice chancellor's desk was piled up with cases, through which he toiled with diligence and dispatch. No long delay until the argument was forgotten; no piles of dust accumulating on the papers grown brown with age; no 'Jarndyce *v.* Jarndyce,' to make the temples white, and the brain sick with the law's delay; he decided the cause, and the parties were left, to acquiesce or appeal.

When the new constitution of 1847 went into effect, he was elected one of the justices of the supreme court for the 2d district, and drew the longest term. His associates were Justices McCoun, Strong and Morse. The code of practice was soon prepared and put into operation. It had the effect of extirpating from Judge Barculo's mind the last remains of a *radical and reforming spirit.*

His predilections were ultra democratic, and progressive, but when he saw the ark of the law, venerable and sacred, profaned by unholy fingers, and its time-honored principles and practices swept away, as he thought, by a reckless effort at change, he rebelled with the whole force of his mind against the desecration, and although he administered the code fairly, so far as its conflicting provisions were at first susceptible of being understood, yet he expressed himself in no measured terms upon the folly and impracticability of many of its provisions, and often alleged that the interests of the state demanded its entire repeal, more time being wasted by courts and counsel in learning what the code meant than in trying the merits of the action; and it yet remains to be seen how far he was in error. He was sometimes hasty in his expressions, when the code was under discussion. In the case of *Alger* v. *Scovil*, 6 *How. Pr. Rep.* 144, he says, 'It is in truth greatly to be regretted that those who assumed the responsibility of devising a remedy for the insufficiencies of the former sys

tem, did not more fully understand and appreciate the true cause and nature of the evils to be remedied, which arose mainly from the want of sufficient judicial force to dispose of the rapidly increasing business of a growing state and a commercial people. But in this age of progress it not unfrequently happens that alteration is mistaken for reformation, and the public, feeling the necessity of some improvement, is too often contented with a mere change.' It was on the argument of this case, that D. D. Field, Esq. one of the codifiers, after contending for his view of the case, exclaimed, 'I know that was the *intent* of the legislature,' 'I beg your pardon,' said the judge, 'the legislature meant exactly what they have said and nothing else.' 'Well,' replied the counsel, 'I know the codifiers meant so.' 'Ah!' responded the judge, 'very likely! They seem to have *meant* one thing and *said* another very often, if your argument is good.' It was on this same occasion that a wordy lawyer, bent on making a speech, was endeavoring to show that his client could get nothing if an assignment was held good. 'May it please your honor!' continued the orator, 'the execution will be made out, following the solemn judgment of the court; the officer will take it in his hand, and proceed to the premises of the defendant; he will open the door and gaze round upon empty shelves!' Here the judge's brow began to contract. 'Sir! vacancy will open before him.' The judge broke in, 'Do you mean to say he will find nothing to satisfy the execution?' 'Yes, your honor.' '*Well*,' said the judge, '*why did'nt you say so half an hour ago!*'

He held his position of justice of the supreme court for six and a half years, under the new constitution: with what ability and success, his published opinions upon the various questions of practice, and of law and equity, in the volumes of Howard's Practice Reports, and Barbour's Supreme Court Reports will abundantly show. It is said by his judicial brethren, that no member of the court was more candid and severe in the re-examination of his acts at circuit, than himself, when they came up for review, and that he had no pride of opinion to prevent him from seeing his own errors, and uniting promptly to correct them. This trait is highly important so long as we retain the anomaly in our judicial system of a judge reviewing himself!

Judge Barculo had no *negative* characteristics; none of the easy and facile non committalism upon questions of politics or law which has been sought for of late to make a man *available*, and which always indicates weakness and mediocrity. He came to his conclusions rapidly, and was open and fearless in their avowal, and this as well when

upon the bench in the discharge of his official duties, as in the walks of private life He was a determined foe to the licentiousness of the press; no man was more tenacious of its freedom; no one lamented more sincerely, or would have punished more severely its prostitution. The case of *The People* v. *Wilkes*, a few years ago, excited great attention. It was tried at the Dutchess oyer, before the judge, and employed some of the best jury talent of the state. The libel was upon A. L. Jordan, then attorney general, and arose out of some transactions in New York. The attack was very abusive and violent. Jordan, with his young friend Calvin Mather, conducted the prosecution, and Daniel E. Sickles and J. T. Brady, the defense. The charge of the judge went very far in securing conviction; it was logical, clear, pointed and pungent, tracing the distinction between liberty and licentiousness, the right to print, and the right to abuse public and private citizens, and pour over the heads of others the gall and wormwood of a malicious and depraved heart. From the tone of his charge, and the rather free expression of his opinion, the prisoner apprehended a severe sentence, and quietly 'stepped out,' while his adroit counsel were, 'all unconsciously' pressing some motion upon the attention of the judge. Wilkes escaped, much to the judge's mortification, and domiciled for a time in New Jersey, and afterwards left for Europe, when the matter died away. The firmness and energy of his character were so marked and prominent as to seem almost like bluntness, to those who did not thoroughly know him. He was sometimes impatient that one should labor through so many words to reach a conclusion which stood out clear to his own mind. Yet the occasion was rare, that he did not listen patiently and fully to all that was said.

I know not that he was ever accused of favoritism. It is true, that a jury could usually tell where his private opinions lay, and he would sometimes help the presentation of the case, where counsel were inefficient; but the opinions formed were always *upon the proof*, and not from any feeling for the party. If any complaints were made, they were founded usually on the party's defeat, and fault finding with the judge in such cases is common enough everywhere!

Let me conclude this imperfect sketch by alluding to some of his private habits and characteristics, for these after all are the *man*. showing his tastes and feelings when official cares are laid aside, and he follows the bent of his own inclination.

He was one of the most extensive readers I ever knew. The public library of this city consists of several thousand volumes, many of them rare and valuable books. The judge took great interest in this

library, and in the selection of its volumes, and I very much doubt at the time of his death, whether there was a readable book in it, of which he did not know the substance and scope. He usually had three or four of the volumes on his table, and seldom came from his residence, or left the city for home, without one or two were seen under his arm. He was the most varied and voracious reader among us, and yet I never knew him make a parade of what he did in this respect. He had a keen literary taste, and indulged in it in this manner, more than in committing any results of his reading or reflection to paper. He mastered the contents of a book with great facility, not by plodding through every line of it, but by taking hold upon its leading points and gathering out the substance of them; an example not always safe to follow, but still very necessary to an extensive reader. He was highly indignant when Judge ———'s spiritual visions were published. He thought it an impeachment of the good sense of the judiciary, and wrote and delivered a lecture on the subject before the lyceum of this city, in which he characterized the whole affair as a 'miserable humbug and delusion unworthy of serious or scientific attention.'

He spent considerable time and money in horticulture. He had about five acres of land highly cultivated, and his varieties of strawberries, peaches, pears, &c. became quite celebrated in this region. He paid attention also to grape culture and the manufacture of wine, of which he left some fine varieties. He contributed some papers to the 'Horticulturist,' on the varieties and management of fruit.

He visited Europe three times, as much to be on the ocean in his passage as to observe for himself the manners and customs of foreign society, and the machinery of their social and political life: the first time in 1846; again in 1850; and the third and last time, the April previous to his decease.

His fondness of the water amounted to a passion; owning a sail boat, he would occasionally take his son Sidney—a noble boy of quick intelligence and manly character, now, alas! sleeping by his side—and, hoisting sail, pass with a favorable wind to New York, across the bay, and up into Shrewsbury river, where he usually passed the summer, principally in sailing and bathing. He was worse in London and Paris after his last voyage, but uncomplaining; always kind and considerate to those about him; and would insist on going with his young friends to places of interest, that their visit might not be marred by his afflictions. Finding himself no better, in June he turned his face homeward, and, growing feebler and feebler, he had one great

wish, not to go down into the deep, but to die in his home, and surrounded by those who were dear to him. But that home he never reached. His unconscious dust reposed a while in its now desolate halls, and

'Gently we laid him down to rest,
With his own white roses on his breast.'

He lies in the cemetery, which, shortly before his departure for Europe, he was most active in procuring, as if in prophetic anticipation that he would soon occupy it.

His only son, Sidney, was killed by an accidental fall, eleven weeks afterwards—and father and son rest together in hope.

The same year he came to the bar he married Cornelia, daughter of John H. Tallman, Esq. of New York city, who with three daughters, survives.

Judge Barculo was a member and communicant of the Protestant Episcopal Church, and met a martyr's death with Christian heroism.

He well merited the epitaph inscribed upon his monument:

'In Society, an Ornament;
In the State, a Judge, fearless, dignified and incorruptible;
In habit, simple and pure.
HE DIED YOUNG, BUT MATURE
in usefulness and fame,
Adorning Jurisprudence by the clearness of his decisions,
And illustrating Religion by
THE STRENGTH OF HIS FAITH!'"

# INDEX.

## A

### ACCOUNT.

*See* INJUNCTION, 1.
JOINDER OF CLAIMS, 2.

### ACTION.

*See* BOARD OF SUPERVISORS.
CREDITOR'S SUIT.

### AGREEMENT.

1. *Construction and validity.*

1 The plaintiffs agreed with the defendant that they would subscribe for, and become responsible to take fifty shares of the capital stock of the Troy and Boston Rail Road Company, of the estimated value of $5000, and to pay $500 upon the subscription. They further agreed, after having paid the $500, to assign and transfer to the defendant, by a proper instrument of conveyance, all the said stock, &c. The defendant, in consideration thereof, agreed that after the plaintiffs should have paid the sum of $500, and upon their executing and delivering to him "an assignment or transfer of all said stock," he would execute and deliver to them a covenant to pay the remainder of the amount which would be due upon the subscription, and indemnify the plaintiffs and save them harmless against all claims, &c. arising in consequence of their liability incurred by becoming stockholders in the said company. The plaintiffs, in pursuance of this agreement, executed and tendered to the defendant an assignment of 50 shares of the capital stock of the rail road company, which they had previously subscribed for, and on which they had paid $500, and also a power of attorney to transfer the stock on the books of the company. The by-laws of the company provided that no stock should be transferred on the books of the corporation until thirty per centon each share had been paid in, unless by consent of the board of directors. The plaintiffs made application for such consent, and it was refused. The defendant declined accepting the assignment, on the ground that it was not a compliance with the terms of the agreement. The company sued the plaintiffs to recover the balance of their subscription, and obtained a judgment for $4690.85, which the plaintiffs paid. At the time the assignment of the stock was tendered, and at the time of the trial, the stock was worth from 40 to 43 cents on the dollar. *Held* 1. That it was enough that the plaintiffs had executed an instrument which would transfer their interest in the stock to the defendant; it being no part of their agreement that they should procure a transfer of the stock upon the books of the company.. 2. That the instrument executed by the plaintiffs would enable the defendant, if he desired it, to have the transfer made,

upon the books of the corporation, upon complying with its by-laws. And that it was for him, and not the plaintiffs, to pay the residue of the 30 per cent required before a transfer upon the books could be obtained. 3. That having an instrument which would authorize him to procure such transfer to be made, upon making the requisite payment, it did not lie with the defendant to object that the transfer had not been actually made. 4. That the amount which the plaintiffs had been compelled to pay, upon the judgment against them, as the consequence of the defendant's breach of his agreement, was the proper measure of the plaintiff's recovery for such breach. *Orr* v. *Bigelow*, 21

2. By a written contract made between N. T. and S. P. T., the latter agreed to pay the former $1300 in installments, and in consideration thereof N. T. agreed that S. P. T. might have the possession and use of a certain canal boat, &c., unless default should be made in the payment of the said sum of $1300, or some part thereof, or unless S. P. T. should do or attempt to do, any of the acts by the agreement prohibited; in either of which cases N. T. might take possession of the boat, &c. On the full payment of the $1300, N. T. was to execute and deliver to S. P. T. a bill of sale of said boat, and put him in possession. S. P. T. agreed not to take or attempt to remove the boat out of the state, or transfer or attempt to transfer, the same without the consent of N. T., or to do any thing to prejudice his title. In case default should be made in the payment of the said sum of $1300 or any part thereof, N. T. was to have the right to take and sell the boat and apply the proceeds to pay the balance unpaid, paying over the surplus, if any, to S. P. T. It was further provided that nothing contained in the contract should be so construed as to give S. P. T. any right or title to the boat, until such payment should be fully made; except the right to possess and use the same, in the manner and upon the conditions in such contract mentioned. *Held* that this instrument was an executory contract for a *sale* of the boat on condition, and not a *mortgage* thereof; the parties intending, in respect to the title, simply to agree for the sale and purchase of the boat for the sum specified; the sale, and vesting of the title, to be upon the condition of payment according to the agreement, and until payment the title to remain in N. T. JOHNSON, J. dissented. *Brewster* v. *Baker*, 364

3. *Held*, *further*, that S. P. T. could not acquire any title to the boat until he had paid the price; and therefore could not transfer any title to a third person, so as to enable the latter to hold the boat as against N. T. or his assignees and grantees. *ib*

4. There is a distinction between contracts which are immoral and criminal and those that are merely void. Where the contract is simply void and not criminal, assistance may be given to a party to recover back his money, while the contract remains executory. Where money has been paid on an illegal contract which has been executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid. *Pepper* v. *Haight*, 429

5. A distinction also exists where the action is in affirmance of the contract, and the object is to enforce its performance, and where the action proceeds in disaffirmance of it. *ib*

6. Where both parties are equally guilty, as where they make a contract which is illegal, because contrary to the provisions of a statute, or the general principles of public policy, the rule *potior est conditio defendentis* applies. *ib*

7. The principle is that no court will lend its aid to a man upon an immoral or illegal contract—not for the sake of the defendant, equally in fault with the plaintiff, and in whose mouth it does not lie to say the contract is immoral or illegal—but because the court will not lend its aid to such a plaintiff. *ib*

8. Where a mortgage contains a clause showing that a part of its consideration is the sale of certain premises in the possession of a third person, and held adversely by him, under a claim of title, the contract is directly in conflict with the statute prohibiting the sale of pretended titles. (2 *R. S.* 691, § 6.) And both parties are guilty of a misdemeanor, and the contract is entirely void. *ib*

9. An executory contract, for the sale and purchase of land, was made between the plaintiff and defendant, by which the latter was to have the occupation and possession of the premises, so long as he should fulfill and comply with the stipulations of the contract. But if he should make default, then the agreement should be void, and the plaintiff was to be at liberty to immediately enter into the possession and occupancy of the premises, and was to be forever discharged from the agreement. *Held* that upon a breach of the contract by the defendant, the plaintiff had a right to enter, without notice, or demand of possession. *Stone* v. *Sprague*, 509

2. *Performance.*

10. A contract for the sale and purchase of land provided that on the payment of $745, in five years, with annual interest, the defendant should be entitled to a deed. On the day before the time for payment expired, the defendant tendered the plaintiff the amount, in specie, and requested a deed. The plaintiff replied that he would not receive any thing, nor give a deed; placing his refusal upon the ground that he had not enjoyed such privileges, in the house, as he ought to have had, and saying that he and the defendant must settle, and he would not give any deed till they did. The parties then agreed to leave the question as to damages, to M. and W., and the plaintiff agreed to see W. and ascertain when he could attend to the matter. An indorsement was then made upon the contract, signed by the plaintiff but not under seal, extending the time of payment to the 25th of April. On or about that day the money was again offered to the plaintiff and a deed requested. He again refused to receive the money, or to convey; saying he had not been able to get W. to attend to it: another indorsement was then made on the contract, extending the time of payment to the 15th of May. A few days before the 15th of May the defendant again tendered the money to the plaintiff, if he would execute a deed; which was refused. *Held* that the defendant had substantially complied with the terms of the agreement, so as to be entitled to a deed for the premises; and that, the defendant having been prevented from performing the contract, at the day, by the act of the plaintiff, the latter could not be allowed to take advantage of his own wrong, by insisting that the time for performing the agreement by the defendant had expired *ib*

11. *Held also*, that proof that at the time of the last tender, and at other times, the plaintiff agreed by parol, with the defendant, not to take advantage of the expiration of the contract, saying that the lapse of a few days would not make any difference with him; and that the money, together with a deed, ready to be executed by the plaintiff, were tendered, on the 18th of May, three days after the expiration of the time, as last extended, was proper evidence, and ought to have been received. *ib*

12. The *time* for performing a written contract under seal, may be enlarged by parol. *ib*

3. *When complete and binding.*

13. On the 30th of August, 1853, the defendants proposed to the plaintiffs, by letter, as follows: "We will engage to furnish you a boat load of flour, the last of next week, same quality sent G. and M., at $4.76, free to boat." This proposition was immediately answered by the plaintiffs in these words: "We will take the boat load flour, as per your proposition in yours of the 30th inst." *Held* that this was a clear and unqualified acceptance, by the plaintiffs, of the defendant's proposal, and that as soon as the plaintiffs' letter had gone beyond their control the bargain was complete, and it became mutually obligatory upon the parties, and could not be rescinded by either, without the consent of the other. *Clark* v. *Dales*, 42

14. The letter of acceptance contained this inquiry: "Please say to us how we shall remit?" *Held* that this inquiry did not qualify the acceptance of the defendant's proposition. *ib*

4. *Parol extension.*

15. The time for performing a written contract under seal, may be enlarged by parol. *Stone* v. *Sprague*, 509

16. It is competent for parties, by a subsequent parol contract, to extend

the time for the performance of the original agreement; and this without any new consideration. *Clark* v. *Dales*, 42

5. *Delivery and acceptance.*

17. Delivery is essential to the validity of a deed or contract; and it is always competent to show, by parol, that there has not been a delivery. *Stephens* v. *Buffalo and New York City Rail Road Co.* 332

18. There can be no delivery without an acceptance by the party who is to receive the deed. *ib*

19. Where, in an action of ejectment, the defendants claim the right to the possession, under a written contract for the sale and conveyance of the premises to them by the plaintiff, evidence is admissible in behalf of the plaintiff, to show that the alleged contract was never delivered, but was placed in the hands of the defendants' agent, not as such agent, and not as a contract, but to be presented by him, in behalf of the plaintiff, to the defendants, as a proposition for their acceptance or refusal, and to be void as a proposition, unless the defendants should give notice to the plaintiff of its acceptance, within a specified time; that such notice was not given; and that afterwards, and before any notice of acceptance, by the defendants, the plaintiff gave notice to the agent of the defendants, as such agent, that he withdrew the offer. *ib*

20. Under such circumstances, the paper will not bind the plaintiff, as a contract, until the defendants have accepted it; and until acceptance, the plaintiff may withdraw or rescind it. *ib*

21. And a declaration by the plaintiff, to the defendants, that he will not be bound by the proposition, made at any time before acceptance, will terminate it. *ib*

22. Where the execution of a paper by one party is completed by a delivery thereof to the agent of the other party, as a contract, parol evidence of conditions qualifying the delivery is not admissible; and the party signing the paper will be bound, although it is not signed by the other party. *ib*

ALE.

*See* EXCISE LAW.

AMENDMENT.

1. Where one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment by the purchaser, of a readiness and willingness to receive and pay *at that place*, in case he sues, for a non-delivery, is indispensably necessary in the complaint. But the omission to make it is a defect which is cured by a verdict; and an *amendment* of the complaint is admissible and appropriate, under such circumstances, for the purpose of securing certainty and harmony in the record; and is sanctioned by § 173 of the code. *Clark* v. *Dales*, 42

2. The amendment may be ordered at a general term, and without formal notice of motion for that purpose, when the object of the amendment is only to conform the complaint to the facts found, and when the record furnishes the only grounds for and against the same. *ib*

3. Where a complaint and answer are both very general in point of form, but neither party demurs, and both have gone to trial with a full understanding of their rights, and neither party has been taken by surprise by the pleading of his adversary, and a full and fair investigation has been had, upon the merits, such an *amendment* will be allowed as may be necessary to conform the complaint to the facts proved, and as will do substantial justice to both parties. *Hunter* v. *The Hudson River Iron and Machine Co.* 493

APPEAL.

1. Where an objection to the competency of a witness examined before a surrogate, is not raised there, it will be deemed to have been waived, and will be of no avail on appeal. *McDonough* v. *Loughlin*, 238

2. An omission to challenge a juror is a waiver of all objections to him; and this whether there be an appear

ance, or not. Consequently a party to a suit before a justice, who fails to appear, on the trial, cannot raise the objection, on appeal from the judgment, that some of the jurors who tried the cause were not competent, as such, for want of the requisite property qualification. *Clark* v. *Van Vrancken*, 278

3. Where an objection to testimony is taken on the trial, on a specific ground, and in such a manner as to induce the opposite party to believe that such is the sole ground, the party objecting will not be allowed, on appeal, to place his objection upon a different ground, and one which, if it had been urged at the trial, might have been obviated. *Briggs* v. *Smith*, 409

4. Objections may be urged, on an argument at a general term, which were not raised on the trial, if they are such as could not have been obviated at the trial. *Pepper* v. *Haight*, 429

ARBITRATION AND AWARD.

1. *Agreement to submit; submission.*

1. An agreement for the submission of matters in difference to arbitration, followed by the arbitrators entering upon their duties—the arbitration being still pending and undetermined—constitutes no defense or legal obstacle, in abatement or in bar, to an action for the same matters, commenced after the making of the agreement. *Smith* v. *Compton*, 262

2. Such an agreement is a mere authority, revocable by either party, at any time before the case is finally submitted to the arbitrators for decision, subject only to liability for damages. *ib*

3. Where a submission was in writing, under seal, to hear the evidence in reference to a certain lease, "to the end that all matters in controversy in that behalf, between the parties, should be finally concluded" &c., and a subsequent agreement, between the parties recited that they had agreed "to submit their matters in controversy" to arbitration; *Held* that it was the intention of the parties that the arbitrators should pass upon all matters in reference to the lease; whether all the rent had become due or not; so as to end all controversy between them which had arisen, or might arise, out of that instrument; and that consequently the award was not void although it embraced the rent not then due, and damages subsequently to accrue, under the lease. *French* v. *New*, 482

4. Where a submission purported to be made pursuant to the provisions of the statute for determining controversies by arbitration, but it contained no clause agreeing that a judgment should be entered in a summary manner upon the award to be made; *Held* that this was not a submission under the statute. (1 *R. S.* 541.) *ib*

2. *Parol evidence as to proceedings.*

5. *Mistakes* or *errors* of arbitrators, in respect to the matters submitted to them, cannot be inquired into, or corrected, in a court of law. Parol evidence cannot be received, therefore, to show such mistakes or errors. *Briggs* v. *Smith*, 409

6. But parol evidence to show that the arbitrators *exceeded their powers* is admissible in a court of law; and if that fact is proved, it will render the award void. *ib*

7. Thus where a submission was general, of all matters whatever *between the parties;* HELD that evidence to show that the arbitrators took into consideration matters not submitted to them, viz: matters between one of the parties and a third person, was admissible. *ib*

8. Where, in an action upon an award the defendant offered to prove by one of the arbitrators, "that the arbitrators took into consideration matters not submitted to them; also that they included in the award about 15 perch of stone as the property of the defendant, and did not include it in the written award;" *Held* that this was not to be construed as one entire offer and therefore inadmissible as embracing a matter as to which no evidence could be received, viz: to show the mistake; but that the proposition was to be treated as constituting two distinct offers, one of which was proper. *ib*

9. Where there is not enough on the face of an award to show that the arbi

trators did not go beyond the submission, parol evidence may be resorted to. And the arbitrators, or either of them, are competent witnesses to prove that matters were included in the award which were not contained in the submission; in a case where no bad faith on the part of the arbitrators is alleged. *ib*

10. Where the submission was to hear the evidence in reference to a certain lease, "to the end that all matters in controversy in that behalf, between the parties, should be finally concluded" &c., it was *held* that parol evidence that the rent yet to become due, and other claims, were taken into consideration by the arbitrators, was proper for the purpose of showing whether the arbitrators took into consideration matters beyond the submission, or not. *French* v. *New*, 481

3. *Validity of award.*

11. Where that portion of an award which is void for not being within the submission, is so connected with the rest of the award that it is impossible to distinguish between the valid and the invalid portions, the whole award is void. *Briggs* v. *Smith*, 409

12. Parties, after having by their bonds of submission to arbitration, required the award to be *in writing*, and subscribed by the arbitrators, may waive that requirement, by parol, and receive a *verbal award*, which will be binding on both. *French* v. *New*, 481

13. Thus where a submission required the award to be made in writing under the hands of the arbitrators, subscribed by them or any two of them, and attested by a subscribing witness, but before the arbitrators made any award, the parties said to them they had substituted other writings which they had drawn up and executed, under seal, in place of a formal award in writing, and that all they, the parties, wanted to know, was *how much* was awarded, and they could fix the amount, in the instrument, as they had agreed; and that they did not want the award in writing, but wished the arbitrators to award *verbally*; IT WAS HELD that the parties had waived that part of the condition of the submission bond which required the award to be in writing. *ib*

14. Such an agreement for a parol award operates as a new submission; and the parties are *estopped* from saying that the parol award, made in pursuance of their directions, is void. *ib*

15. The principle that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned, applies to such a case. *ib*

16. Where there is a submission, by writing, under seal, of all matters relating to a lease, to arbitration, and a subsequently executed parol agreement between the parties, consenting that the arbitrators may make a *verbal* award, an award by parol will discharge the lease. *ib*

17 Proof that, previous to a submission of matters respecting a lease, the rent due thereon &c., one of the arbitrators counseled with the defendant, and told him his rent was too high, will not show such corruption, partiality or gross misbehavior as would invalidate the award at law; and is therefore inadmissible. *ib*

18. Such evidence cannot be given by the arbitrator himself; on the ground that it would go to impeach his award. *ib*

## ASSESSMENT.

*See* MUTUAL LIFE INS. COMPANIES.

## ASSIGNMENT.

*See* DEBTOR AND CREDITOR.

## ASSUMPSIT.

1. If a person, without compulsion of law,, or legal obligation, pays the debt of another without a previous request, the debtor is not liable for the amount. *Ingraham* v. *Gilbert*, 151

2. A pecuniary benefit, voluntarily conferred by the plaintiff and adopted by the defendant, is not such a consideration as will support an action of assumpsit, on a subsequent implied promise. *ib*

ATTORNEY.

1. In an action for a partition, after the plaintiff's attorney had become entitled to certain fees for his services, and to over $100 for disbursements, the plaintiffs assigned their shares in the property to C. and wife, and one of the plaintiffs assigned also all costs and allowances that *he* might have, by the suit. The assignees claimed the right to substitute a new attorney, and continue the suit, without paying the former attorney any thing. The court refused to allow the substitution until the *disbursements* were paid. Subsequently, the property being sold, and the plaintiff's costs brought into court, *it was held* that the assignment did not transfer any costs or allowances to which the attorney was entitled, but only those belonging to the assignor. *Creighton* v. *Ingersoll*, 541

2. It was *further held* that when C. and wife took an assignment of the action as it stood, and the benefit of the progress then made in it, they took it with the burthens then incident to it, one of which was the liability to have the costs then incurred deducted from the recovery by them. The amount of costs due to the former attorney, as adjusted previous to the substitution, was therefore directed to be paid to him, before paying over the fund in court to the plaintiffs *ib*

B

BAIL.

*See* PROHIBITORY LIQUOR LAW. 8, 9, 10, 11, 12.

BILL OF EXCEPTIONS.

*See* CRIMINAL LAW.

BOARD OF SUPERVISORS.

1. Even in cases where no discretion is vested in a board of supervisors, in relation to an account presented to them, and a clear legal duty rests upon the r, to cause the whole amount of the account to be levied, collected and paid, as a county charge, which they refuse to perform, an *action* will not lie, against the supervisors. The only remedy of the creditor is by an application to the court for a *mandamus* to compel them to perform that duty. *Boyce* v. *The Board of Supervisors of Cayuga county*, 294

2. To warrant a suit against a board of supervisors, as representing the county, there must be some duty of the county, and the case must be such that an action, founded upon that duty, is the appropriate remedy. *ib*

3. Where the duty relied upon is a duty, not of the county, but of the board of supervisors, no action will lie. *ib*

*See* MUTUAL LIFE INS. COMPANIES.

C

CANAL COMMISSIONERS.

1. The question, as to the liability of a canal commissioner, for a neglect of duty, depends, in each case, upon the *character* of the duty which the statute has imposed upon him. If it is *imperative*, and specific, the commissioner is responsible to any person who has sustained an injury in consequence of his neglect of duty. *Griffith* v. *Follett*, 620

2. But if the duty is to be discharged according to the *discretion* and judgment of the commissioner, he cannot be held responsible to a party who has sustained an injury either by the manner in which he discharges it, or by a neglect to do any particular act falling within the general scope of his duties. *ib*

3. A canal commissioner is to examine the works committed to his charge, and from such examination he is to ascertain and determine, that is, *decide* as to the necessity for any *particular* repair, and act accordingly. *ib*

4. It is not his duty to make repairs when, or as, he may be requested or advised by others. But as to the

necessity of such repairs, their nature and extent, and the time when they are to be made, he is to be guided by his own judgment. And his judgment is conclusive, upon the question, and cannot be called in question collaterally, in an action brought by a party who has sustained an injury by the commissioner's neglect to act, in any particular case. *ib*

5. There is, however, a class of cases in relation to which the duty of the commissioner is, *in its nature*, absolute and certain. Thus, when the navigation of the canal is *interrupted* or *impeded* by any obstruction of the channel, or by the destruction of any bank or structure, the necessity for immediate repairs is apparent, and the duty of the commissioner to make them is imperative. *ib*

6. He has no discretion to exercise, in such a case, as to the necessity of repairing, but is bound to make the repairs without delay; and for a neglect to make them, after notice of the facts showing their necessity, the commissioner is liable to any party injured by the neglect. *ib*

*See* JOINDER OF CLAIMS, 3, 4.

CHATTEL MORTGAGE.

1. Before a chattel mortgage can be upheld as a valid security, where there has been no actual and continued change of possession, the party asserting its validity must establish, affirmatively, two propositions; first, that the transaction was *bona fide*; and, secondly, that there was no intention to defraud creditors or purchasers. *Groat* v. *Rees*, 26

2. It is not enough to show that the mortgage was given for a good and valid consideration. It is equally necessary to prove the absence of a fraudulent intent. *ib*

3. But, where it is admitted that the mortgage was given for a good and valid consideration, it is proper to submit the question to the jury whether it was not also executed without any intent to hinder or delay creditors. *ib*

4. And if there is no evidence that the mortgagor was indebted to any other person than the mortgagee, and there is nothing in the case to show that the mortgage was executed for any other purpose than to secure a *bona fide* debt, the jury will be justified in finding in favor of the validity of the mortgage. *ib*

5. A chattel mortgage can only operate upon property in actual existence at the time of its execution. It cannot be given on the future products of land. *Milliman* v. *Neher*, 37

6. Thus where a lease was executed, in March, 1852, between the plaintiff and M., of a farm, for one year from the 1st of April then next, at a specified rent, and it was stipulated that the plaintiff should have a "lien upon the crops as security for said rent," and that M. should "market the same;" *Held* that a person who had purchased from M. corn, raised upon the farm, with knowledge of the plaintiff's claim to a lien thereon, could hold the same, as against the plaintiff. *ib*

7. A chattel mortgage was executed by P. in the usual form, to K., transferring to the mortgagee the legal title to the property. By the first clause of the condition this title was made defeasible upon the payment of the mortgage debt according to the terms of the condition. By another clause it was provided that if default should be made in such payment, or if K. should at any time deem himself in danger of losing his debt by delaying the collection thereof until it became due, he might take possession of the property *at any time*, *before* or *after* the time limited for the payment of such debt, and sell the same, or so much thereof as should be necessary to satisfy the debt, &c. *Held* that this latter clause did not, by *implication*, give to the mortgagor the right to retain the possession of the property until the happening of the contingency; but that the power given to the mortgagee, by that stipulation, was intended as a cumulative remedy, merely, and did not qualify his right, as the legal owner, to the possession of the property *at all times*, before the performance of the condition which was to defeat his title *Rich* v. *Milk*, 616

8. It was accordingly *held, further*, that an assignee of the mortgage had a right to take possession of the property and to retain it, as against the mortgagor, and all claiming under him, before the mortgage debt became due and payable. *ib*

COMMON SCHOOLS.

1. The renewal of a warrant issued for the collection of a school tax, is equivalent to issuing a new warrant. And if the renewal is signed by only two of the trustees of the school district, the third refusing to sign it, the latter is not liable for any act done under the warrant. *Thomas* v. *Clapp*, 165

2. If a warrant is fair on its face, it affords a complete protection to the collector; and this even though he has knowledge of facts rendering the process void. The warrant is sufficient if signed by two of the trustees. *ib*

3. A warrant is not rendered void by a direction to the collector to collect the amount of the tax, together with *five* per cent for his fees; although the act of 1849 gives the collector only *one* per cent on all sums paid in within two weeks. *ib*

4. The statute does not prescribe a new form for the warrant, but limits the action of the collector under it. *ib*

5. Where a tax is levied and assessed by all the trustees, and in performing that duty they act together and all concur, it is unimportant whether all are present, or not, when the warrant is signed; the signing of the warrant being but a ministerial duty. *ib*

6. The statute requiring the tax to be assessed and the tax list therefor to be made out by the trustees and a warrant attached thereto, within thirty days after the district meeting at which the tax was voted, is merely directory, as to time. It being for the benefit of the public, those acts may be done after the time specified in the statute has elapsed. *ib*

CONDITION.

1. No precise technical words are required, to make a condition precedent or subsequent. The construction must always be founded on the intention of the parties. *Underhill* v. *The Saratoga and Washington Rail Road Co.* 455

2. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act, after taking possession, then the condition is subsequent. *ib*

3. Where a grant was *upon the condition* that the grantees should build and maintain a water tight enbankment or dam over a certain brook crossing the land conveyed, as part of their line of road, and that the said embankment or dam, with the flood-gates and sluice-ways therein, might be used for hydraulic purposes, by the grantors, their heirs and assigns; and it was covenanted that the grantees should not be liable for any damages which the grantors should sustain in case of a break in the dam or an overflow thereof, unless the same should happen through the gross negligence or willful misfeasance of the grantees, but that the grantees should repair all damages which the dam or embankment should at any time sustain, forthwith; *it was held* that the condition was *subsequent*, and that the effect of the deed was to vest the fee simple of the estate in the grantees, subject to be defeated by a neglect or refusal to perform the condition. *ib*

4. *Held also*, that the effect of an omission to perform the condition, by the grantees, was to give the grantors or in case of their death, their heirs, the right of entry; but that no action could be maintained by an assignee of the grantors, to recover the land; whether the breach was before or after the assignment. *ib*

5. *Held further*, that by a general assignment, made by the grantors, to

a third person, of all their property, rights, claims and demands, the condition was gone, and the grantees obtained an absolute estate, and were discharged from the condition, and all claim for damages for a breach of it. *ib*

6. *And held*, that the condition could not be construed to be a *covenant*, so as to enable the assignee of the grantors to maintain an action to recover damages for a breach thereof. *ib*

7. Nor can the assignee, in such a case, maintain an action for damages, on the ground of an *implied covenant*. *ib*

8. A condition in a deed, when explicit words are used, creating such condition, will not be construed into a covenant, except to avoid a forfeiture. *ib*

CONSIGNOR AND CONSIGNEE.

1. Where goods are consigned to joint factors the consignees are in the nature of co-obligors, and each is liable for the whole. *Briggs* v. *Vose*, 477

2 And although, upon a dissolution of the partnership, one retires, and the other sells the goods and receives the avails, yet an action lies against both for not fulfilling their duty in selling and accounting; and they may both be held liable for not accounting. *ib*

CONSTITUTIONAL LAW.

1 The act of April 8, 1851, relating to life insurance companies, was not a violation of the article of the constitution of the United States by which the citizens of each state are entitled to all the privileges and immunities of citizens in the several states. *The People* v. *Imlay*, 68

2. An incorporated company is not a *citizen*, within the meaning of that section. (*Const. art.* 1, *sec.* 1.) *ib*

3 The charter of the United States Trust Company of New York is not unconstitutional. *The United States Trust Company* v. *Brady*, 119

4. The constitution gives the legislature the power, in its discretion, to create corporations other than banks, by special charter. And when that discretion has been exercised, the courts cannot review the action of the legislature. *ib*

*See* PROHIBITORY LIQUOR LAW.

CORPORATION.

1. A plaintiff admits the corporate existence of a corporation, by suing it by its corporate name. And this admission will not be overcome by his alleging, in the complaint, facts which, if true, would go to show that the defendant had failed to comply with such terms as by the charter were conditions precedent to its organization as a corporate body. *The People, ex rel. Marshall*, v. *The Ravenswood, &c. Turnpike and Bridge Co.* 518

2. In such a case the latter allegations in the complaint may be disregarded, as being irrelevant and impertinent; inasmuch as a plaintiff cannot be permitted to treat the defendant as a corporation in fact, for the purpose of suing it, and then insist that it never performed those acts, without performing which it could not have acquired existence. *ib*

3. Where the complaint, in an action against a corporation, alleged that the defendant had violated its charter, and also that it had omitted to do certain things claimed to be essential to give it a legal, corporate existence, and prayed that the defendant might be excluded from the franchises claimed by it, and that the corporation might be dissolved; *Held*, on general demurrer to the whole complaint, that the complaint, as *a whole*, was good; it containing but one subject matter, viz: the right of the defendant to continue to exercise certain franchises. CLERKE, J. dissented. *ib*

COSTS.

1. A claim of possession is not a claim of title to land. In its most comprehensive sense, the term title em

races the possession, but not in the sense in which it is used in the section of the code giving costs to the plaintiff in actions for the recovery of real property, or where a claim of title to real property arises on the pleadings, or comes in question. As there used it is nothing less than an assertion of a right of possession. *Rathbone* v. *McConnell*, 311

2. Where the object of an action was to recover damages, sustained in consequence of an act done by the defendants above the plaintiff's land, by which the water of a water-course, passing over such land, was diverted and the plaintiff deprived of the use of it, the defendants alleged as a defense, that the act was done with the leave, license and permission of the plaintiff, *it was held*, that the answer was to be viewed as setting up a mere license, and that under this issue the title to the land did not come in question, so as to entitle the plaintiff to costs under the 304th section of the code. *ib*

*See* ATTORNEY.

COUNTER-CLAIM.

In an action against several defendants who are jointly and severally liable, either of them may set off promissory notes executed by the plaintiff, or may avail himself thereof by way of counter-claim. *Briggs* v. *Vose*, 477

COURTS OF SPECIAL SESSIONS.

A court of special sessions is one of limited jurisdiction, deriving all its power from the statute. It can only acquire jurisdiction over the person of the accused upon his request to be tried before it, or his omission, for 24 hours after being required to do so, to give bail for his appearance according to law. *The People* v. *Berberrich*, 224

*See* PROHIBITORY LIQUOR LAW, 8 to 15.

COVENANT.

1. Where the condition of a mortgage, given for the purchase money, stated that the title to a portion of the mortgaged premises was in dispute, the land being claimed by a third person, and that the mortgagee had agreed to give a good title to such disputed part, and stipulated that if he failed to do so, before or at the time the first payment became due on the mortgage, the mortgagor should have the right to keep back from the mortgage moneys whatever sums he should have to pay to obtain a good title and possession of the disputed part of the premises; *Held* that the covenant to give a good title was not a condition precedent to the payment of the mortgage. *Pepper* v. *Haight*, 429

2. When mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other; but when the covenants go to only a part of the consideration, then a remedy lies on the covenant, to recover damages for a breach of it, but it is not a condition precedent. *ib*

3. Where a plaintiff, in his complaint and on the trial, claims to recover *land* by way of *forfeiture*, on the ground of a failure to perform a *condition* on which it was granted, he will be considered as waiving any claim for damages for *breach of a covenant* contained in the grant. He cannot be allowed to pursue both remedies at the same time, and in the same action. *Underhill* v. *The Saratoga and Washington Rail Road Co.* 455

CREDITOR'S SUIT.

1. An action will lie, in aid of a suit at law, to reach property and effects in the hands of parties who, it is alleged, have fraudulently received the same from the judgment debtors, and unjustly assert a claim thereto, against the plaintiff's judgment and execution. *Hammond* v. *The Hudson River Iron and Machine Co.*, 378

2. The remedy, where a creditor's bill was proper previous to the code, is still preserved, in the form of an action in the supreme court. *ib*

3. The judgment creditor may commence the action for his own benefit, or in behalf of himself and others

in the same situation with himself who may choose to come in and contribute to the expenses of the suit. The rule has not been changed by the code. *ib*

4. It is not a subject of demurrer that all the creditors of the judgment debtors are not joined as plaintiffs. *ib*

5. A judgment creditor, who has exhausted his remedy at law, may obtain relief against his debtor's property in the hands of a fraudulent assignee, by a direct action against the debtor and the assignee, to reach the property thus held under the void assignment. *ib*

6. Where, in an action brought by a judgment creditor, against the judgment debtor, in aid of the suit at law, the complaint alleges that property and money received by third persons, under and by virtue of a fraudulent assignment and judgment, was the property of the judgment debtor, such third persons are necessary parties to the action. *ib*

7. And where, independent of any claim such third persons might set up as owners of the property sought to be reached by the action, they were charged by clear, distinct and specific allegations in the complaint, with fraudulent and unlawful acts, and with efforts to hinder and delay the plaintiffs in the collection of their debt; *Held*, on demurrer, that this was enough to render them proper parties to the action. *ib*

8 Where the subject of an action is the property of a judgment debtor, and the cause or ground of action is an impediment thrown in the way of collecting the plaintiff's judgment, and the object of the action is to remove the impediment—all other results being merely incidental, such as accounting for and applying the avails of the property which may be reached—and the defendants are charged jointly with the commission of the fraudulent acts, and they are alike concerned in the judgment, or thing to be recovered, although their interests, as to separate parts, are distinct, the complaint will be held to contain but one cause of action. *ib*

CRIMINAL LAW.

1. The right to a bill of exceptions, in a criminal case, is given by statute; and its office is to bring up for review questions of law made and decided on the trial. *Wynhamer* v. *The People.* 557

2. The statute which gives the right, limits it to exceptions taken on the trial of the *main issue.* It is not extended to such as are taken on the trial of preliminary or collateral questions, such as motions to quash the indictment for irregularity, challenges to the array, &c. *ib*

CUSTOM.

1. In an action upon a memorandum acknowledging the receipt of a quantity of corn in store, "on freight," the defendant offered to prove that it was the custom, at the landing where the corn was delivered, and had been for forty years, to pay for grain left on freight after the owner had ordered it to be freighted, and not before; and that this custom was known to the plaintiff, and that he himself had been in the habit, for many years, of leaving grain at that place, to be freighted, upon the same terms. *Held* that the evidence should have been received; and for its rejection the judgment was reversed. *Outwater* v. *Nelson,* 29

2. *Held also,* that the plaintiff could not recover, upon such memorandum, without proving that the defendant had shipped the corn, or that he had been called upon for payment. *ib*

D

DAMAGES.

1. Where a contract is made for the sale and delivery of goods at a future day, and the purchaser is ready and willing to perform on his part, on the day and at the place appointed, but the vendor refuses to deliver the goods, the true measure of damages, in an action by the purchaser, is the difference between the contract price and the value of

the goods agreed to be delivered, on that day, with interest. *Clark* v. *Dales*, 42

2. Where, in an action against a rail road company to recover damages for a personal injury occasioned by a collision, there was evidence showing that the plaintiff had been incapacitated by the injury from labor most of the time for nearly two years, and there was also testimony tending to prove that the disability would be permanent, or at least long continued; *Held*, that a verdict of $4,500 was not so excessive as to indicate partiality, prejudice, passion, or any thing improper, in the jury. *Curtiss* v. *The Rochester and Syracuse Rail Road Co.* 283

*See* AGREEEMENT, 1.
INSURANCE, 18.
RAIL ROAD COMPANIES, 1 to 6.
TRESPASS, 3, 4.

## DEBTOR AND CREDITOR.

1. Where assignees, under an assignment made for the benefit of creditors, reconvey to the assignor the real estate embraced in such assignment, without having paid and satisfied the debts for the payment of which the trust estate was created, such reconveyance is absolutely void, at least as to all creditors whose debts were provided for in the assignment, and which remained unpaid at the date of the reconveyance. *Briggs* v. *Palmer*, 392

2 And in a contest between a person claiming title under and in consonance with the trusts created by the assignment, and an incumbrancer of the title attempted to be conveyed by the trustees in contravention of such trusts, the validity of the mortgage will be in no way helped by the fact that the mortgagees, at the time of taking it, had no actual notice of the existence of a claim against the trust estate, or of the assignment, and reconveyance. *ib*

3. The assignment, and the reconveyance, are matters of record, which the statute makes sufficient notice to all subsequent purchasers and incumbrancers. And such purchasers or incumbrancers, having constructive notice of the assignment, are put upon inquiry as to all claims and rights under it. *ib*

4. Trustees cannot, by a recital in a reconveyance of the assigned property, contrary to the fact, affect the interest of the *cestuis que trust*. Therefore a recital that the debts of the assignor have all been paid, will be of no avail. *ib*

5. After a debtor has assigned his real estate in trust for the benefit of creditors, he, having no title, cannot create an incumbrance upon the estate. A mortgage executed by him will therefore, at most, only operate as an assignment or equitable mortgage of his residuary interest, after the trust shall have been fully executed. Under this, the mortgagee may, *it seems*, pay a debt existing against the trust estate, before a sale of the trust property to pay the debt, and a transfer of the title. *ib*

6. But after the title has passed to a bona fide purchaser at a judicial sale ordered for the purpose of satisfying a previous debt of the assignor, there can be no *redemption* by any one standing in the position of the assignor, or claiming under him subsequent to the creation of the trust estate. *ib*

## DEED.

1. A certificate of acknowledgment of the execution of a deed, by a married woman, stating that on an examination before the officer "separate and apart from her husband" she acknowledged the execution of the same "without fear or compulsion from him," is a sufficient compliance with the statute requiring the officer to certify, upon an acknowledgment by a feme covert, that on "a *private* examination, apart from her husband, she executed the conveyance *freely* and without any fear or compulsion of her husband." *Dennis* v. *Tarpenny*, 371

2. A deed of conveyance, and a bond and mortgage executed by the grantee, to secure the payment of the

purchase money, and bearing even date with the deed, form parts of one transaction, and are to be construed together, as one instrument. *Pepper* v. *Haight*, 429

*See* AGREEMENT, 10, 11.
DEBTOR AND CREDITOR, 1, 2, 4.

## E

### EJECTMENT.

1. Where an owner of land conveys the same to another, excepting the portions included in the highway, he may maintain an action of ejectment against the grantee, for encroachments upon the highway, or for an exclusive occupation of it, by the latter. *Etz* v. *Daily*, 32

2. In an action of ejectment the plaintiff is bound to show title in himself at the commencement of the action. *Layman* v. *Whiting*, 559

3. If the title upon which he relies is founded upon the foreclosure of a mortgage, by advertisement under the statute, proof of a regular and complete foreclosure is essential to the validity of that title. *ib*

4. If, in an action of ejectment, by the purchaser of premises sold under a statute foreclosure, it appears that the affidavit of service of the notice of sale, upon the mortgagor, was not made until after the commencement of the action, the plaintiff will fail to show title in himself at the time the suit was commenced, and must therefore be nonsuited. *ib*

5. The making and recording of an affidavit of service, after the commencement of the action, will not vest a title in the purchaser, *by relation*, as of a time previous, so as to enable him to recover. *ib*

5. Parol evidence of the service of the notice of sale, upon the mortgagor, is admissible; but it will not dispense with the production of the *affidavit* specified in the statute. *ib*

### ESTOPPEL.

*See* WILL 1.

### EVIDENCE.

1. A justice of the peace cannot be permitted to give parol evidence of what took place before him, *it seems*. But if his docket is afterwards given in evidence the error will be cured. *Smith* v. *Compton*, 262

2. Parol evidence is inadmissible to contradict the docket of a justice. *ib*

3. A consent of the parties, in presence of the justice, that a cause shall be submitted to the justice conditionally, with a reservation to the plaintiff of liberty to withdraw the suit, is binding on the parties, and if entered by the justice in his docket, it forms a part thereof, and is no more subject to be contradicted than any other part of the docket. *ib*

4. No proof can be offered, of facts not put in issue by the pleadings. *New York Central Ins. Co.* v. *The National Protection Ins. Co.* 468

*See* SHIPS AND SHIPPING, 1.

### EXCISE LAW.

The sale of *ale* in less quantities than five gallons without having a license therefor, granted according to the provisions of title 9, chapter 20, of the first part of the revised statutes, is not prohibited by the 15th section of that title, nor declared a misdemeanor by the 25th section. *The People* v. *Crilley*, 246

### EXECUTION.

1. The statute is imperative in requiring the time and place of holding any sale of real estate on execution to be publicly advertised six weeks *previously* in two ways; first by posting the notice in three public places in the town, and second, by printing the same once in each week, in a newspaper of the county. Both methods must commence six weeks *previous* to the day of sale. A less time, in respect to either branch, is insufficient, and renders the sale invalid. *Olcott* v. *Robinson*, 143

2. Where a notice of sale was posted forty-three days previous to the day

of sale, making six full weeks, but the notice published in the newspapers, although it received six separate insertions, once in each week for six successive weeks, was first published only thirty-nine days *previous* to the day of sale; *it was held* that the publication was insufficient; and that the sheriff's deed, executed upon the sale, gave no title to the purchaser. *ib*

3. *Held also*, that the circulation of the notice of sale in slips headed "Plattsburgh Republican, Extra," would not aid the purchaser; that not being such a printing in a newspaper as was contemplated by the statute. *ib*

EXECUTORS AND ADMINISTRATORS.

1. *Liability.*

1. A testator directed his real and personal estate to be converted into money, as soon as convenient, and the proceeds to be securely invested in the most productive manner; leaving it, however, to the *discretion* of his trustees to suffer such part of his personal estate as was then invested in bank stock to remain in that state, so long as they might *deem it most for the interest of the testator's family.* At the time of his death, in January, 1836, the testator held 1000 shares in the stock of the Bank of the United States. The charter of that bank expired March 4, 1836, and on the 18th of February, 1836, the state of Pennsylvania chartered "The United States Bank," an institution designed to take the place of the former; and by arrangement between the two banks the stock of the former national institution was transferred to the new bank. The new bank subsequently failed, involving nearly a total loss to the stockholders. *Held* that the administrator, *cum testamento annexo*, did not render himself liable for the loss upon the testator's stock, merely by *suffering* such stock *to remain* in the state it was in at the testator's death, and to pass, as the rest of the stock did, to the new bank; or by receiving the dividends upon the new stock. *Hogan* v. *De Peyster*, 100

2. It is a matter within the jurisdiction of the surrogate on the final settlement of an estate, to find what each executor is debited and credited for; also what they have received and paid out jointly; in order that he may determine what each is liable for. *White* v. *Bullock*, 91

3. Where there are two executors of an estate, one active and the other inactive, the latter will not be held accountable for the acts of the former, if he has reason to believe that his co-executor is acting prudently, and according to law. The surrogate is therefore bound to inquire whether one or both are accountable. *ib*

4. And the decree made by him, upon such accounting is conclusive, between the executors, as to the amounts received and paid out by each, and cannot be contradicted by sworn accounts of the executors, produced by them upon the accounting. *ib*

2. *Commissions.*

5. Commissions are to be divided between executors according to the services rendered by them respectively; and in the absence of any other proof in respect to such services, the share of each is to be determined by the amount of moneys stated in the surrogate's decree to have been received and paid out by the executors, respectively. *White* v. *Bullock*, 91

6. Justice requires that when an executor has done nothing, and has borne no responsibility, he shall not share in the commissions. *ib*

7. The act of 1849, (*Laws of* 1849, *ch.* 160,) is in accordance with this principle. It *requires* the surrogate to apportion the commissions among the executors according to the services rendered by them respectively. *ib*

8. The circumstance that an executor is entitled to commissions, for his services, will not render him an incompetent witness to establish the will. *McDonough* v. *Loughlin*, 239

9. Those commissions are allowed by statute, by way of compensation for

the executor's services, and are not a gift under the will. *ib*

F

FIXTURES.

1. Looms, placed upon the floor of a woolen factory and fastened to such floor by means of screws in each loom, are a permanent and essential part of the woolen factory. And in the absence of any proof that when they were thus annexed to the building it was not intended they should remain indefinitely in their position, to be used as long as they were capable of use, it will not be presumed that the annexation was merely temporary. They are therefore to be deemed *fixtures*, as between mortgagor and mortgagee. *Murdock* v. *Harris*, 407

2. And a mortgagee of the factory and machinery will hold such looms, by virtue of his mortgage, in preference to a creditor of the mortgagor, who has levied upon the same under an execution issued against the latter; especially in a case where it appears that the parties to the mortgage have treated the looms as fixtures, and intended they should be covered by the mortgage. *ib*

FORECLOSURE.

*See* MORTGAGE, 4 to 8.

FOREIGN LIFE INSURANCE COMPANIES.

1. The act of April 8, 1851, relating to life insurance companies does not prohibit any citizen of this state from applying for insurance to a foreign company which has not complied with the act, on his own account; nor from doing so by his attorney; nor from receiving the policy here, by mail, when issued in another state; nor, as a consequence, from receiving it here through his attorney. But it prohibits the agent of a foreign company from making such delivery. *The People* v. *Imlay*, 68

2. The act does not attempt to prevent a foreign insurance company which has failed to deposit the security required to be given by it, from insuring our citizens; nor does it impose a penalty upon an agent of such a company for acting for it, if he acts out of this state. *ib*

3. Signing a policy in Philadelphia, by an insurance company located and doing business there, and sending it to the applicant, or the attorney of the applicant, in New York, is not a violation of the statute. *ib*

4. The prohibition is expressly limited to the acting *within this state* as agent of a foreign insurance company. And the act only intended it to apply when the actual agency was in this state, and the thing done was actually done in this state. *ib*

5. It is not a violation of the act for a person in this state to act as attorney for an *applicant* to a foreign insurance company; provided the attorney is in good faith acting only as the attorney of the applicant, and not as the agent of the company, under cover of an attorneyship for the applicant. *ib*

FRAUD.

*See* TROVER.
VENDOR AND PURCHASER, 10 to 13.

G

GRANT.

*See* CONDITION, 3, 4.

GUARANTY.

A contract to guaranty the payment of a promissory note, although made simultaneously with the note, and written upon the same paper, and upon a consideration advanced on the credit of the guarantor, conformably to a previous understanding, must *express* the consideration upon which it is made, or it will be void. *The Glen Cove Mutual Ins. Co.* v. *Harrold*, 298

HIGHWAYS.

*See* EJECTMENT, 1.

HUSBAND AND WIFE.

1. Where a lease is executed by husband and wife, of land in which the wife has an estate for life, and the lessee covenants, in terms, to pay rent to both, this of itself is sufficient to entitle the husband and wife to join in an action for the rent; notwithstanding the wife did not acknowledge the execution of the lease and therefore was not bound by it. *Jacques* v. *Short*, 269

2. One effect of uniting the wife, in such an action, is that upon the death of the husband his interest in the cause of action survives to the wife, and no interest vests in the personal representatives of the husband. *ib*

3. By uniting the wife, the husband signifies his assent to giving her such an interest in the cause of action: and he thereby vests the wife with his interest, in the event of his death. *ib*

4. For this reason the section of the statute which gives to the executors or administrators of a person to whom rent shall have been due and unpaid at the time of his death, the same remedy, by action, for the arrears, which the decedent might have had, if living, is not applicable to such a case. *ib*

*See* TRUSTS AND TRUSTEES, 7, 8, 9.
WILL, 1.

I

INJUNCTION.

1. The falsely and fraudulently obtaining an injunction, and the damages occasioned by its service, are not a matter of account, and form no ground for a bill in equity or an action under the statute. (1 *R. S.* 750, § 9.) *Hall* v. *Fisher*, 441

2. The bond given by the party obtaining an injunction affords an ample remedy for any damages sustained by the defendant, and to an action upon such bond he must resort for indemnity. *ib*

INSURANCE (FIRE.)

1. *Who may sue, in case of loss.*

1. A policy of insurance is a contract of indemnity, and without an interest in the subject of insurance, at the time of the fire, the holder of the policy sustains no loss. *Peabody* v *The Washington County Mut. Ins. Company*, 339

2. Hence an assignment of a policy as collateral security for the payment of a sum of money by the assignor, will not enable the assignee to maintain an action on the policy, in case of loss; where it does not appear from the complaint, that he had, at the time of the fire, any interest in the property insured. *ib*

3. But where the assignor remains the owner of the property, until the time of the fire, the whole loss is sustained by him. He continues the owner of the policy, subject to the title of the assignee to it for the payment of his debt, and, it not being available to the assignee, the assignor alone may recover upon it, to the extent of the loss. *ib*

2. *Contracts made by agents.*

4. A contract for insurance, made by an individual who acts as the agent of both parties in making the same, is voidable in a court of equity, at the election of the principals, or either of them. *New York Central Ins. Co.* v. *The National Protection Ins. Co.* 468

5. Where an agent, without the knowledge of his principal, is acting also in behalf of the other party, in making a contract, the presumption of fraud is not an unreasonable one. But the principle forbidding such contracts is a mere rule of equity. If the proper forms have been observed, the conveyance is good at law, and the title passes. The contract is not void, but only voidable. *ib*

6. But this defense cannot be relied on in an action upon a policy of insurance, if it is not set up in the answer. *ib*

7. A general agent of an insurance company for effecting insurances in their behalf, while acting within the

general scope of his authority in making an insurance, will bind his principals, although he departs from his instructions; unless the assured have notice that he is exceeding his authority. *ib*

8 The rule that whatever is known to the agent must be presumed to be known to the principal, it *seems*, is confined to that class of cases where the knowledge of the facts comes to the agent while he is acting for his principal, in the course of the very transaction which becomes the subject of the suit. *ib*

9. Hence the fact that an agent by whom an insurance is effected, had previously received instructions from his principals the insurers, will not be regarded as notice to the insured of those instructions, and that he had exceeded his authority, although the agent was at the time of making the insurance, the secretary of the insured. *ib*

3. *Conditions.*

10. Where conditions of insurance, annexed to the policy, are by an express provision in the policy, made a part of the contract, they have the same force and effect as if contained in the body of the policy. *New York Central Ins. Co.* v. *The National Protection Ins. Co.* 468

11. One of the conditions of a policy was that no insurance should be binding until the actual payment of the premium. The money was in a bank where the agent was in the habit of making his deposits, deposited to the credit of the insured. The cashier told the agent of the insurers, at the time the arrangement for the insurance was made, that he could have the money. The agent directed him to let it lie; saying that when he wanted the money he would draw for it. It was not in fact drawn by him until after the fire. *Held* that the agent had waived a strict compliance with the condition, and that he had authority to do so. *ib*

12. Under a condition in a policy, requiring the assured to give notice to the insurers of any subsequent insurance which may be effected upon the same property, the assured is bound to give notice of a policy which is not void or voidable upon its face, but is merely voidable by the underwriters upon due proof of the facts. *Bigler* v. *The New York Central Ins. Co.* 635

13. If the assured retains the second policy until after the destruction of the property insured, and then brings an action upon it, thereby affirming its validity, which action is settled by the giving and accepting the notes of officers of the insurance company, which the insured still holds, he cannot treat the second insurance as void for the want of a compliance with one of its conditions, but is bound to give notice thereof; although the second policy be voidable if the insurers see fit to set up the defense. *ib*

4. *Payment of premium.*

14. Where a policy is issued and delivered to the insured, and the premium is acknowledged in the policy as actually received, this will be held as conclusive, upon the fact of payment, and will bind the insurer. *New York Central Ins. Co.* v. *The National Protection Ins. Co.* 468

5. *Notice of loss.*

15. Where a fire occurred on the 15th of June, and the insured knew of it on the 18th, and sent notice to the insurers, by mail, on the 23d; *Held* that this was a sufficient compliance with a condition in the policy, requiring notice of loss to be given *forthwith* *ib*

16. Such a provision has never been construed literally to require notice on the day. It has always been held that due diligence, under all the circumstances, was all that was required. *ib*

6. *What is covered by policy.*

17. A policy of insurance upon a "steam saw-mill" covers not only the building itself, but all the machinery and fixtures therein, necessary to make it a steam saw-mill in all its parts. *Bigler* v. *The New York Central Insurance Co.* 635

7. *Reinsurance.*

18. In an action upon a policy of reinsurance, the reinsurer is liable to the

insurer for the costs and expenses incurred in defending a suit brought by the party originally insured. *New York Central Ins. Co.* v. *The National Protection Ins. Co.* 468

INTEMPERANCE.

*See* PROHIBITORY LIQUOR LAW.

J

JOINDER OF CLAIMS.

1. A complaint filed by a plaintiff in his own right as well as in the character of administrator of E. H., against the defendants as the executors of H. F., alleged that the plaintiff and his intestate E. H. were, in the lifetime of the latter, tenants in common owning one undivided quarter with H. F. in his lifetime, who owned three quarters, of a lot of land, and iron ore bed, &c. And the plaintiff claimed that the defendants should account to him in person and as administrator of E. H., for their share of the rents and profits, avails and income of the ore bed, &c. and for their share of the ore dug and raised by H. F., and for their share of the moneys had and received by H. F., including what he ought to have received for the use, rents and profits of the improvements, buildings, fixtures and erections of the plaintiff and E. H., and for the wear and damage of the same &c., and for the loss, damage and injury sustained by the plaintiff and E. H. by reason of the acts done by H. F., while in the exclusive possession, &c. *Held*, on demurrer, that there was an improper joinder of claims in the complaint, in attempting to unite the rights of the plaintiff personally with those in his representative character; the claims being inconsistent and adverse. *Hall* v. *Fisher*, 441

2. The same complaint, in addition to a claim for an account, after setting out the title of the plaintiff and his intestate, to one quarter of the lot and ore bed, and showing large and valuable erections and fixtures made by them, averred that H. F., contriving and intending to injure and defraud the plaintiff and E. H. and *falsely pretending* that they were not the owners of one-fourth part of said lot and ore bed, but that he was sole owner thereof, procured an injunction, and caused the same to be served on the plaintiff and E. H., restraining them from digging or raising any iron ore on said lot, &c., and by means of such service thereof occasioned all the *damages* which the plaintiff alleged were sustained. The plaintiff also claimed to recover damages for trespass on houses, erections and fixtures which the plaintiff and E. H. erected, at an expense of $5000, and for their share of the expense of those erections. The complaint also alleged that H. F. diverted to his own use a quantity of ore dug and raised by the plaintiff and E. H.; and that he received $20,000 profits, and might with proper management, have received $20,000 more. *Held* that the complaint was defective in joining causes of action arising upon *contract*, with claims of damages for *injuries to property* and for torts and causes of action arising from *negligence*, with a claim for an *account* of rents and profits of real estate. *ib*

3. In an action to recover damages for a neglect of duty by the defendant as canal commissioner, the complaint alleged that the defendant *being canal commissioner*, it was his duty to repair the banks of the canal at the place where the injury was sustained. *Held* that this allegation of the defendant's official character was made for the purpose of charging him with the duty for a neglect of which the action was brought; and that if any neglect of official duty which rendered him liable to an action, in any form, was alleged, the action was properly brought against him in his private character; and that the several causes of action were properly united. *Griffith* v. *Follett*, 620

4. *Held also*, that it was no objection to the complaint, that it did not contain any averment that the defendant had funds sufficient to repair the banks of the canal. *ib*

JUSTICES' COURTS

1. The provision of the statute, prescribing the time within which a venire for a second jury, upon a discharge of the first by a justice, for their failure to agree, shall be made returnable, (2 *R. S.* 245, § 111,) was designed for the convenience of the parties, and a compliance with it may be waived by their consenting that the process be returnable at a later period. *Fiero* v. *Reynolds*, 275

2. Where the return of the justice, after stating the discharge of the first jury, added, "I then proposed to the parties to postpone the cause until the 17th day of May, 1853, at &c., to which neither party made any objection. I then issued another venire," returnable at the time and place proposed; *Held*, that it must be inferred, upon the principle that every reasonable intendment is to be made in support of a judgment, that the parties understood the proposition, and said nothing indicating dissent; that the parties were in a position requiring them to express their dissent, or be concluded; and that the omission to object was equivalent to an express consent to the postponement. In such a case a consent, in express terms, is not necessary. *ib*

3. An omission to challenge is a waiver of all objection to a juror, in like manner as an omission to plead a defense is a waiver of the defense. And this, whether there be an appearance or not. *Clark* v. *Van Vranckeu*, 278

4. Accordingly, where, in an action before a justice of the peace, an adjournment took place, after issue joined, and the defendant, although present, did not appear on the trial, *it was held* that he could not, on appeal from the judgment, raise the objection that some of the jurors who sat upon the trial were not competent, as such, for want of the requisite property qualification. *ib*

JUSTICE'S DOCKET.

*See* EVIDENCE, 1, 2.

L

LEASE.

1. Where land is demised to A. and he conveys the same to B. by deed, without any reservation or reference to the lease, and B conveys to C. and the latter to D. in like manner, D. acquires all the interest of A., the original lessee, therein, and becomes in law an assignee of the lease; and as such he is liable on the covenant to pay rent. *Jacques* v. *Short*, 269

2. An assignee is liable on all covenants which run with the land—as covenants to repair, pay rent, &c.—although not expressly named therein. *ib*

3. And he cannot claim any benefit from the omission of the lessor to record the lease. He is chargeable with notice of the lessor's rights; inasmuch as they fully appear in the chain of his own title. *ib*

LEGACY AND LEGATEE.

1. Where there is a bequest of the whole residue of the testator's estate, after payment of debts and legacies, to one person for life, limited as to part, upon a contingency, to the use thereof for life, with a valid gift over of that part, upon the happening of the contingency, and as to the rest, absolute of the entire estate, as to the part of the estate to which the contingency relates, the income can only be paid to the residuary legatee; but as to that portion of the estate respecting which the bequest is absolute, the principal must be paid. *Trustees of the Theological Seminary of Auburn* v. *Cole*, 521

2. The gift over does not attach to the entire residuary estate, so as to render the whole a security for its payment, but the executor may, as to the legatee, set apart a principal sum sufficient to discharge the gift, and proceed to satisfy the other legacies. *ib*

3. And the residuary, and any other legatee, who has been paid his legacy, will not, in case of a subse-

quent deficiency of assets to pay the gift, from the waste of the executor, be obliged, for that reason, to refund any part of what he has received. *ib*

4 The residuary legatee is not entitled, before the happening of the contingency, to demand of the executor, on account of the legacy to him, any thing further than the balance of such legacy, after deducting a sum sufficient to pay the contingent gift when it shall become payable. *ib*

5. The administrator of the residuary legatee is not liable to the contingent legatee, for the payment of the contingent gift, after the contingency has occurred, without at least an allegation, and proof, that his intestate, or himself, has received more than the intestate was entitled to receive, and of such other circumstances as would clothe him with the character of a trustee for the plaintiff as to the excess. *ib*

LIBEL.

1. Whether matter contained in a publication is libellous or not, is a question for the decision of the court; but, if libellous, it is for the jury, and not the court, to say whether it is applicable to the plaintiff. *Green* v. *Telfair*, 11

2. Thus where a libellous article did not point to any person in particular, but the plaintiff had expressly averred, in his complaint, that it was published of, and concerning himself, and he had proved some facts tending to sustain that averment; *Held*, that it should have been submitted to the jury to determine whether the libel was intended to apply to the plaintiff. *ib*

LICENSE.

A parol license to divert water from a water course, so as to prevent it from passing over another's land, is valid. *Rathbone* v. *McConnell*, 311

LIMITATIONS, STATUTE OF.

1. The 110th section of the code which requires that a promise, to take a case out of the operation of the statute of limitations, shall be in writing, is not applicable to cases where the right of action had accrued before the adoption of the code. *Gillespie* v. *Rosekrants*, 35

2. Rights of action which had accrued previous to the time when the code was enacted, and which then existed, are expressly excluded (by sec. 66) from the operation of the section which requires that a new promise, in order to take a case out of the statute of limitations, shall be in writing. *Glen Cove Mutual Ins. Co.* v. *Harrold*, 298

M

MALICIOUS PROSECUTION.

An action for malicious prosecution will not lie until the final termination of the suit; and the complaint must allege a want of probable cause, by averring that the suit was finally determined in favor of the defendant therein. *Hall* v. *Fisher*, 441

MANDAMUS.

1. Where an office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person; the proper remedy of the applicant being a *quo warranto*, or the action substituted in its place by the code. *The People, ex rel. Lockwood*, v. *Scrugham*, 302

2. But where the relator had been, for several years before, and was at the time when the commission to the defendant was issued, the actual occupant, claiming under color of right to hold the office, and never having at any time relinquished it; *Held* that if his claim was valid, neither the commission to the defendant nor the interference of the latter in the discharge of the duties, would constitute an actual expulsion from the office, inasmuch as the possession would follow the right; and that it was not a case of expulsion, but of interference by

the defendant with the functions of an office actually held by another. *ib*

3. In such a case the incumbent should not be required to elect to consider himself out of possession of the office, and then be obliged to resort to a tedious action to procure his restoration. *ib*

4. The relator was duly elected a brigadier general, by the field officers of his brigade, in 1841. He held the office, and was in the discharge of its duties, when the act of May 13, 1846, was passed. Under that act a brigade was formed, consisting of the militia of his previous command, with a slight exception, with the addition of the militia of three other counties. The relator was, on the 9th of June, 1847, assigned to the command of the brigade thus constituted, (the 7th) pursuant to a provision contained in the 8th section, in the following words: "The brigadier general in commission and highest in rank residing in such brigade district shall be the commanding officer of such brigade." He held such command when the constitution of 1846 went into effect. By that instrument the provision for electing brigadier generals by the field officers of the brigade was continued. The 5th section of the 11th article is in these words: "The commissioned officers of the militia shall be commissioned by the governor, and no commissioned officer shall be removed from office, unless by the senate, on the recommendation of the governor, stating the grounds on which such removal is recommended, or by the decision of a court martial, pursuant to law. *The present officers of the militia shall hold their commissions subject to removal as before provided.*" On the 5th of May, 1855, the governor issued a commission to the defendant, as brigadier general of the 7th brigade, and on the same day issued a general order, revoking so much of the order of June 9th, 1847, as assigned the command of the brigade to the relator, and directed the defendant to assume the command of the brigade. *Held* that the governor was not authorized, by the act of April 17, 1854, or any other statute, to displace the relator, or to appoint the defendant; and that both the commission to the defendant and the general order accompanying it were null and void. A peremptory mandamus was accordingly awarded, requiring the defendant to permit the relator to exercise the office of brigadier general, without interruption or intrusion from or by the defendant. *ib*

*See* BOARD OF SUPERVISORS.
MUTUAL LIFE INS. COMPANIES.

## MARRIED WOMEN.

*See* DEED, 1.
WILL 1.

## MASTER AND SERVANT.

A servant, to be entitled to recover of his principal for an injury happening to him in the course of his service, through defects in the machinery &c. used in the discharge of his duties, must prove actual notice to his principal of the defects. And in order to be able to prove notice, he must allege it in his complaint. *McMillan* v. *The Saratoga and Washington Rail Road Company*, 449

*See* RAIL ROAD COMPANIES, 9, 10.

## MAXIMS.

The maxim *de minimis non curat lex* is not an appropriate answer to an action for violating a clear legal right. *The Ellicottville and Great Valley Plank Road Co.* v. *The Buffalo and Pittsburgh Rail Road Co.* 644

## MORTGAGE.

### 1. *Consideration.*

1. The sale of a pretended title to land is an illegal consideration. It is both criminal and immoral; and a mortgage given for the purchase money is void. *Pepper* v. *Haight*, 429

2. Where a mortgage contains a clause showing that a part of its consideration is the sale of certain premises in the possession of a third person, and held adversely by him, under a claim of title, the contract is directly

in conflict with the statute prohibiting the sale of pretended titles. (2 *R. S.* 691, § 6.) And both parties are guilty of a misdemeanor, and the contract is entirely void. *ib*

2. *Certificate of acknowledgment.*

3. Where a mortgage purports to have been executed by a corporation, through its treasurer, a certificate of acknowledgment stating that the treasurer testified, before the officer, that he was the treasurer of the corporation; that it was a corporation, but had no corporate seal; that he signed his name to the mortgage and affixed his own seal thereto, by the order and resolution of the trustees of said corporation duly made and given in writing; and that the same was executed by him as such treasurer, for the purposes therein mentioned, is *prima facie* sufficient evidence of the due execution of the mortgage, without producing and proving the resolution of the trustees; where the instrument is offered for the purpose of proving an act or acknowledgment of their pecuniary condition, by the mortgagors. *Hunter* v. *The Hudson River Iron and Machine Co.* 493

3. *Foreclosure.*

4. Upon the foreclosure of a mortgage by advertisement and sale under the statute, a copy of the notice of sale must be served upon the mortgagor, if he is living, or upon his personal representatives if dead; otherwise there can be no valid foreclosure. *Cole* v. *Moffitt*, 18

5. If the party alleging the validity of the proceedings would show an excuse for not serving the mortgagor with notice, he must prove the death of the mortgagor, by legal evidence, and not by mere hearsay or reputation. *ib*

6. The right of a mortgagee to acquire the title to the mortgaged premises upon a sale under the statute, is given, and the manner in which the title is to be transferred to him, is regulated, by statute. *Layman* v. *Whiting*, 559

7. In the absence of a deed to the purchaser, from the mortgagee, the affidavits of the publication and posting and service of the notices of sale, &c., take the place of such a deed, and operate as a statute conveyance They are necessary, in order to complete the foreclosure, and transfer the title to the mortgaged premises; and until they are made and completed no title will vest in the purchaser. *ib*

8. And if, in an action of ejectment by the purchaser, it appears that the affidavit of service of the notice of sale upon the mortgagor was not made until after the commencement of the action, the plaintiff will fail to show title in himself at the time the suit was commenced, and must therefore be nonsuited. *ib*

4. *Sale of premises; title.*

9. Where the title to property purchased at a foreclosure sale was objected to, on the ground that the order of court authorizing the execution of the mortgage was void against devisees, it was *held* that the title would be rendered good by the execution of a release by the devisees. *Grady* v. *Ward*, 543

10. And the devisees being of age and consenting to release their interests, and the release having been ready before the hearing; it was *further held* that the purchaser was not excused from taking the title. *ib*

11. If the title of a mortgagor is good by adverse possession, that is such a title as a purchaser at a foreclosure sale is bound to take. *ii*

*See* COVENANT, 1, 2.
FIXTURES.

MUTUAL LIFE INSURANCE COMPANIES.

1. Mutual Life Insurance Companies, incorporated previous to the year 1849, are liable to taxation upon their accumulations, as capital. *The People, ex rel. The Mutual Life Ins. Co.* v. *Board of Supervisors*, 81

2. And where a company of that description having a fund, employed in its business, amounting to nearly three millions of dollars, was taxed by the assessors upon only $100,000,

of personal property, *it was held* that the tax commissioners, on reviewing the assessment roll, had the power to add $900,000 thereto, making the amount of personal property belonging to the company, liable to taxation, one million of dollars, and that the board of supervisors was right in refusing to restore the original assessment, and in confirming the judgment of the commissioners. *ib*

3. A judgment, entered at a special term, denying an application for a *mandamus*, to compel the board of supervisors to restore or reduce the assessment to the sum of $100,000, and to apportion or fix the tax upon that amount, instead of one million of dollars, and to correct the tax accordingly, was therefore affirmed. *ib*

N

NEGLIGENCE.

*See* RAIL ROAD COMPANIES, 6, 7, 8.

O

OPINIONS OF WITNESSES.

1. The value of services may be proved by the opinions of witnesses who are acquainted with the value of labor in the vicinity. *Lewis* v. *Trickey*, 387

2. But a defendant cannot prove by witnesses what the plaintiff's services were worth over and above his board, clothing, &c. furnished by the defendant, without proving or offering to prove that the witnesses knew the quantity or value of either item assumed by the question to have been furnished. *ib*

3. Neither can the defendant be permitted to ask a witness how much *under all the circumstances*, were the plaintiff's services worth, over his board. *ib*

P

PARTIES.

*See* CREDITOR'S SUIT, 3 to 7. PLEADING, 8, 9.

PARTITION.

It is well settled, that tenants in common may make partition by parol; and that it is binding when followed by possession according to the partition. *Mount* v. *Morton*, 123

*See* WILL, 1.

PLANK ROADS.

1. In an action by a plank road company, the plaintiffs, to establish their incorporation, proved that notice of opening the books of subscription as required by the laws of 1847 was properly given; that stock to the amount of over $500 per mile was subscribed to the original articles of association; that directors were elected, on due notice; that articles of association were subscribed, as required by the act, and indorsed by an affidavit of three directors, and duly filed in the office of the secretary of state; also that the plaintiffs had, under their organization, constructed the road and put the same in operation. *Held* that the plaintiffs had proved themselves to be a corporation. *The Eastern Plank Road Company* v. *Vaughan*, 155

2. The defendant, among others, signed a paper by which the subscribers, for value received, promised to pay B. and W. $100 for each share by them subscribed for the purpose of building a certain plank road. And B. and W. were authorized to transfer the subscriptions to a company thereafter to be formed for the purpose of building said road. The defendant took one share. Subsequently articles of association were adopted and signed by subscribers for stock, to an amount exceeding the sum required by statute, without including the defendant; and the organization was completed by filing the articles of association, and the subscription signed by the defendant and others was transferred to the company by B. and W., and the defendant's name was subscribed to the books by them. *Held* 1. That the subscription of the defendant was legal, and binding upon him; as much so as if he had subscribed the articles of association with his own hand. 2. That the subscription was legally transferred to the plaintiffs; and that

such transfer vested in them the title to such subscription, and the authority to collect and receive the moneys due or to become due under it. 3. That the promise of the defendant purporting to have been made for value received, this was *prima facie* sufficient evidence of a consideration to uphold the subscription. 4 That the agreement might be regarded as an offer or proposition on the part of the subscribers that, provided a company should be organized to construct the plank road mentioned, each would take the number of shares of capital stock, therein, by them subscribed, and the organization of such corporation as an acceptance of that offer or proposition. And that such promise could be enforced, because it induced others to enter into engagements, assume liabilities, and incur expense, on the faith of such proposition. *ib*

3 By the articles of association of a plank road company, executed in September, 1850, the subscribers promised to pay in their subscriptions as called for by the directors, not exceeding 25 per cent at any one time. On the 25th of March, 1851, a call of 13 per cent was made, payable April 15th, and calls of 15 per cent each, payable May 1st, May 15th, and June 1st; and on the 13th of June a call for the balance, 42 per cent, payable on the 1st of July, was made; notice of which calls was immediately given to the defendant. *Held* 1. That calls in sums not exceeding 25 per cent payable at any one time, were necessary, by the terms of the defendant's agreement, before any liability thereon accrued. 2. That the 39th section of the plank road law of 1847 had no application to a common law action, brought to recover the amount of the calls; and that 30 days previous notice of the calls was not requisite to the defendant's liability in such action. That notice is necessary only where the cumulative remedy of forfeiture of the stock is sought. 3. That the call for the first four installments was a compliance, on the plaintiff's part, with the defendant's agreement to pay; but that the call for 42 per cent, being for a sum greater than he had contracted to pay at any one time, imposed no liability on him. 4. That the defendant had a right to waive the call for installments in sums not exceeding 25 per cent; and that no objection being raised, either in the answer, or on the trial, to the plaintiff's right to recover, on that ground, the right to object must be deemed to have been waived. 5. That it was not requisite that the 5 per cent should be paid on the defendant's subscription, to make it valid and binding upon him; the corporation being created without his stock. *ib*

4. The second section of the act of 1847 only requires five per cent to be paid in on the stock relied upon as a basis to create the corporation. *ib*

5. The forfeiture of stock, authorized by the 39th section of that act, in case of non-payment of calls, is a cumulative remedy, and can only be pursued on a full compliance with the requirements of the act. *ib*

6. Where subscribers agree to pay the amount of their subscriptions, at such times and in such manner as shall be required by the board of directors, as soon as the board makes the requirement the obligations of the subscribers become operative, without the notice of thirty days mentioned in the 39th section of the plank road act. *ib*

7. That notice is to be regarded as preliminary only to a right to forfeit the stock. *ib*

8. Proof that a plank road company has, in accordance with the statute, been duly incorporated and organized, and has built its road, and procured the same to be inspected, and has erected toll gates thereon, and is in the actual use, occupation and enjoyment of the road, is sufficient to enable the company to maintain an action of trespass, for an entry upon the road, against any persons who do not show a better right to the possession of it in themselves. *The Ellicottville and Great Valley Plank Road Co.* v. *The Buffalo and Pittsburgh Rail Road Company*, 644

9. Since the act of 1851, in relation to rail road companies, such companies have no right to enter upon, occupy or cross a turnpike or plank road, without the consent of the owners, except upon the condition of first paying the damages sustained by the turnpike or plank road company, after the same shall have been ascertained under the statute. *ib*

10. Although, by the 5th subdivision of the 28th section of the general rail road act, a rail road company is empowered to construct its road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch, this provision is to be construed as granting only the right which the public had in such streams, plank roads, turnpikes, &c. and not as attempting to grant any right to violate private property without the consent of the owners. *ib*

## PLEADING.

### 1. *Complaint.*

1. When one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment, by the purchaser, of a readiness and willingness to receive and pay *at that place*, in case he sues for a non-delivery, is indispensably necessary to a good complaint. *Clark* v. *Dales*, 42

2. But the omission to make this averment is a defect which is cured by a verdict. *ib*

### 2. *Answer.*

3. A complaint alleged that the plaintiff, on or about the 31st day of May, 1851, was lawfully possessed, as of his own property, of one large gold English lever watch of the value, &c., and that the plaintiff, on or about the time above stated, did lend said watch, without any consideration therefor, to the defendant, for the space of four days, with the promise on the part of the defendant, that within that time said watch should be returned to the plaintiff, its rightful owner. It then charged that the defendant knew the watch was the property of the plaintiff, and that with intent to defraud, &c., he had not delivered it to the plaintiff, &c., but had "converted and disposed of it to the defendant's use," &c. *Held*, 1. That the allegation that the watch was lent to the defendant, by the plaintiff, although not necessary to be made, in that form, was a material allegation, for the purpose of connecting the defendant with the property, so as to lay a foundation for the allegation of a refusal to deliver it, on request, and of a conversion; and was issuable. 2. That a denial, in the answer, that the plaintiff, "on or about the 31st day of May, 1851, did leave such watch as aforesaid with the defendant, for any period, with the promise of this defendant to return the same to the plaintiff," was bad pleading, in form; it being a negative pregnant; but that it controverted the allegation as to the lending of the watch to him, and put it in issue, within the meaning of § 168 of the code That it was an informal denial, and unless objection was made, for defect of form, before trial, it would be waived, and each allegation would be regarded as controverted. 3. That an allegation, in the answer, that the defendant was "not informed" and could "not state," whether the plaintiff was, at the time stated in the complaint, possessed as of his own property, of the watch, was not warranted by the code. 4. That a denial of all fraudulent intent on the part of the defendant, "or any unlawful conversion of said watch to his own use," formed no material issue in respect to the intent; and that the denial of any unlawful conversion was not intended to controvert that the defendant actually converted and disposed of the property to his own use, but simply the unlawfulness of what he did. 5. That an averment, in the answer, of a sale and delivery of the watch to the defendant was not inconsistent with the allegation in the complaint, of a bailment, and therefore a denial of it; it not appearing, on the face of the pleadings, that the sale was not subsequent to the bailment. *Elton* v. *Markham*, 343

4. A denial, in an answer, must be general or specific, or it must be of any knowledge or information, &c., sufficient to form a belief. *ib*

5. A defendant who makes a defense by answer, must, besides answering the plaintiff's case as made by the complaint, state in his answer every matter of defense of which he intends to avail himself. *New York Central Insurance Co.* v. *The National Protection Ins. Co.* 468

3. *Demurrer.*

6 Where a demurrer is to the whole complaint, if one of the plaintiffs might have judgment separately, it is bad. *Peabody* v. *Washington County Mu. Ins. Co* 339

7 A demurrer must be sustained or fail to the whole extent to which it is applied. *ib*

8. A demurrer will not lie for a misjoinder of parties. *ib*

9. The defect of parties for which a demurrer is allowed, under § 344 of the code, is a deficiency of, and not too many, parties. *ib*

*See* JOINDER OF CLAIMS.
RAIL ROAD COMPANIES, 9, 11.

POSSESSION.

*See* TITLE TO LAND.

PRESUMPTION.

*See* TRUSTS AND TRUSTEES, 7, 8, 9.

PRINCIPAL AND AGENT.

1. It is a general rule that whatever is known to an agent must be presumed to be known to the principal. *New York Central Ins. Co.* v. *The National Protection Ins. Co.* 468

2. But *it seems* this rule is confined to that class of cases where the knowledge of the fact comes to the agent while he is acting for his principal, in the course of the very transaction which becomes the subject of the suit. *ib*

3. A principal is liable for the fraud or misconduct of his agent: and he not only cannot take any benefit from a misrepresentation, fraudulently made by the agent, but is bound to make compensation for injuries sustained by others, thereby. And this, although the principal may be innocent; provided the agent acted within the scope of his authority. *Hunter* v. *The Hudson River Iron and Machine Co.* 493

4. There need not be express authority to make a particular representation, but the authority may be implied, as incident to a general authority. *ib*

5. A general authority to an agent to purchase goods on credit, is an authority to make the necessary representations as to the credit and solvency of his principal. Such authority is necessarily incident to the power to purchase on credit. *ib*

6. And declarations made by the agent, while applying for goods on credit, as to the credit and solvency of his principal, are part of the *res gestæ*, and are equally obligatory upon the principal as if made by himself. *ib*

7. In such a case, even if the principal does not know, at the time, that the representations of his agent are false, he is liable to the vendor, upon the principle that of two innocent parties the one shall suffer who, by his *agent* causes the injury. *ib*

*See* VENDOR AND PURCHASER, 11.

PROHIBITORY LIQUOR LAW OF APRIL 9, 1855.

1. *Validity and Constitutionality.*

1. So much of the 1st section of the act of the legislature entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, as declares that intoxicating liquors shall not be sold or kept for sale, or with intent to be sold, except by the persons and for the special uses mentioned in the act; so much of sections 6, 7, 10 and 12 as provide for its seizure, forfeiture and destruction; so much of the 16th section as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him which shall be purchased, taken, detained, or injured, unless he prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him; so much of section 17 as declares that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale; and so much of section 25 as declares that

intoxicating liquor kept in violation of any of the provisions of the act, shall be deemed to be a public nuisance—are repugnant to the provisions of the constitution for the protection of liberty and property, and are absolutely void. ROCKWELL, J., dissented. *The People* v. *Toynbee*, 168

2. The last clause of section one of the act of April 9, 1855, for the prevention of intemperance, pauperism and crime, excepting from the operation of that section liquor, the right to sell which "is given by any law or treaty of the *United States*," does not apply to liquor in the possession of a person who has purchased the same from the importer, in the original packages, and who retails the same from those packages, as it is called for. *Wynhamer* v. *The People*, 567

3. The selling of imported liquor, by any person other than the importer, and such others as are allowed to sell, by the act, is therefore prohibited by the first section as qualified by the second and other sections of the statute. And upon the trial of an indictment, under the act, evidence by the defendant to show that the liquor sold by him was imported by another, from foreign countries, under the revenue laws of the United States; that the duties have been paid thereon; that he purchased the same from the importer, in the packages in which it was imported; and that it was drawn from those packages when sold by him, is immaterial, and should be rejected. *ib*

4. The right to sell imported liquor, given by the laws of the United States, is subject to two important qualifications; 1. That it remains in the hands of the importer; and 2. That it shall be sold in the condition in which its importation is authorized, and that all sales by other persons, or in any other quantity or condition than that in which it is imported, are subject, like the sales of all other property, to such regulations as may be prescribed by state laws. *ib*

5. The right is neither general as to persons, nor in its application to the property to which the laws of the United States relate. The right, on the contrary, is limited to *certain persons*, and qualified by the *status of the property*. *ib*

6. While it is in the hands of the importer, and in the condition in which it was imported, the laws under which he has imported it give *him* a right to sell it in that condition. This is the extent of the right. When he parts with the property, or changes its condition, his right, and *all* right to sell it, derived from those laws, ceases. It is no longer the right to sell which is given by the laws of the United States. *ib*

7. The prohibition of the sale of liquor, contained in the first section of the act for the prevention of intemperance, pauperism and crime, passed April 9, 1855, as it is qualified by the second and other sections, is not repugnant to the provisions of the constitution, but is a valid legislative act. *ib*

2. *Bail; trial of accused before courts of special sessions.*

8. Where an individual is brought before a magistrate, upon a warrant issued for a violation of the act of April 9, 1855, "for the prevention of intemperance, pauperism and crime," the magistrate should take his examination; and if, upon such examination, it appears that no offense has been committed, or that there is no probable cause for charging the accused therewith, he should be discharged. If there is probable cause to believe the defendant guilty, bail should be taken, if offered by the defendant, for his appearance at the next court having cognizance of the offense. *The People* v. *Berberrich*, 224

9. The legislature did not intend, by that act, to extend the jurisdiction of courts of special sessions so far as to compel persons accused of offenses against the act, to submit to a trial before that tribunal in cases where the accused should offer bail for their appearance at the next court of sessions, or oyer and terminer, at all events. *ib*

10. The 5th section of the "act for the prevention of intemperance, pauperism and crime," passed April 9th, 1855, does not, either in terms or by just or fair implication, restrict the

power of courts of special sessions, in respect to offenses under that act, to cases where the party charged either requests to be tried by such court or omits to give bail. On the contrary, it seems to contemplate that the justice or other officer before whom the accused shall be brought by virtue of the process, shall proceed at once to the trial of the charge. *The People ex rel. Booth* v. *Fisher*, 625

11. Not only is the power conferred upon the magistrate to try the accused, but he is imperatively required to hold a court of special sessions, and proceed to the trial as soon as the complainant can be notified. Neither his power, or his duty to try, are made to depend upon the defendant's request to be tried, his omission to give bail, or any other condition. *ib*

12. The magistrate may therefore proceed to the trial of the accused, notwithstanding the latter offers to give bail for his appearance at the next criminal court having cognizance of the offense. *ib*

13. Section 2 of article 1 of the constitution, which declares that "The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever," was not intended to apply to such a case. *ib*

14. The expression "the trial by jury," as used in that section, refers as well to all other incidents of the trial as to the number of men necessary to constitute the jury; and means such a trial as is contemplated by section 6 of article 1 of the constitution, for persons charged with capital or otherwise infamous offenses; which must be upon presentment or indictment of a grand jury, and in a court of record with common law jurisdiction. *ib*

15. All offenses which are not capital or otherwise infamous crimes, are left under the regulation of the legislature, in regard to trial by jury. *ib*

Q

QUO WARRANTO.

*See* MANDAMUS, 1.

R

RAIL ROAD COMPANIES.

1. *Actions against, for personal injuries.*

1. In an action against a rail road company, to recover damages for an injury sustained by a passenger by means of a collision, it is not erroneous for the court to charge the jury that, in ascertaining the amount of the plaintiff's damages, it is proper for them to consider the bodily pain and suffering which has occurred, or is likely to occur, in consequence of the injury, but that they cannot act upon conjecture as to the prospective condition or situation of the plaintiff; and that the jury can only consider, in respect to the future what the evidence renders reasonably certain will necessarily and inevitably result from the original injury. *Curtiss* v. *The Rochester and Syracuse Rail Road Co.* 282

2. Bodily pain and suffering which is necessarily and directly to flow from the injury, is as much a part of the injury as the continuance of a physical disability occasioned by it. *ib*

3. Only one action can be maintained to recover damages for a personal injury. Yet it is not necessary for the injured person to wait until all the consequences of the injury have become fully developed. He is entitled to sue whenever he thinks proper, and to recover damages for both past and future pain of body, as well as for past and future deprivation of health, or of any of his bodily powers. *ib*

4. But in respect to all the subjects of damage, it is requisite that they should be legal, direct and necessary results of the injury, and that those which, at the time of the trial, are prospective, should not be conjectural. *ib*

5. Damages arising from bodily pain and suffering need not be alleged specially in the complaint. *ib*

6. Where it appeared, from the evidence, that the cars were thrown off the track of a rail road, and a collision thereby occasioned, because

the rails were not right, or from some defect in the mode of securing them in their place; *Held* that the degree of care which the law imposed on the rail road company required them to see that the rails were in a right position, and not to trust exclusively to the lever of the switch, when the rails were in open view while moving it; and also to see that the rails were firmly secured; and that if they omitted to do so they were guilty of negligence. *ib*

7. It was therefore *held*, further, that the question of negligence was properly submitted to the jury. *ib*

8. Also *held*, that proof, uncontradicted, that the switch was rightly placed, did not rebut all presumption of negligence. *ib*

9. Where, in an action against a rail road company, the complaint, after stating that the defendants were an organized company and the owners of the road, and were running it, averred that on &c., while they were so running the road, the plaintiff's intestate was in the employ of the defendants, as an engineer upon their locomotive, while it was in their use and service: *Held* that this was a sufficient allegation to show that the relation of master and servant existed between the parties. *McMillan* v. *Saratoga and Washington Rail Road Co.* 449

10. But no special contract between the principal and agent is to be inferred from such an allegation. *ib*

11. Where a complaint alleged that W. S. M., the plaintiff's intestate, was in the defendants' employ as engineer upon a locomotive used and running upon their rail road; that it was the duty of the defendants to provide a good, safe and secure locomotive &c., and a good, safe and secure track, and to keep the same in good repair, and to build, maintain and keep in good repair all necessary bridges, fences and cattle-guards, but that they, not regarding their duty, wrongfully and negligently provided, used and suffered to be used, an unsafe, defective and insecure locomotive, and failed and refused to provide a good, safe and secure track and road, or to keep the road in good repair, and neglected to build, maintain and keep in good repair all necessary bridges, fences and cattle-guards; that through a defect in the fence which it was the duty of the defendants to maintain and keep in good repair, a horse got upon the track from an adjoining lot, without any fault of W. S. M., and in consequence of the defendants' neglect to provide proper cattle-guards, ran over the road until he came to a bridge, where the locomotive struck the horse; and the locomotive was thrown off the track and W. S. M. was killed; *it was held*, on demurrer, that the complaint was defective, in not averring *actual notice* to the defendants, of the defects occasioning the injury, or some of them. *ib*

2. *Duty and rights of engineers.*

12. It is the duty of an engineer, employed in running a locomotive upon a rail road, and it is confided to him by his employers, to guard against all accidents liable to happen by the escape of horses or other animals, upon the track, through a defect of fences, or otherwise. Hence he is bound to make known to the rail road company any defects of that nature which may exist. So in respect to any defects in the locomotive. And for not making them known he is responsible to the public as well as the company. *McMillan* v. *Saratoga and Washington Rail Road Company*, 449

13. He may require special indemnity against all risks, or he may give notice to the company and throw the risk upon them. *ib*

3. *Proceedings to acquire title to land.*

14. The existence of a *mortgage* which is a lien upon land taken and used by a rail road company for the purpose of constructing and operating its road, is one of the *defects* in the title to such land, contemplated in the 21st section of the general rail road act of 1850, so as to authorize such company to proceed anew to acquire a valid title, in the same manner as if no appraisal had been previously made, nor any attempt to procure the title by agreement and purchase. *In the matter of the New York Central Rail Road Company*, 419

15. The company is not obliged to wait until the mortgaged premises are sold under a decree of foreclosure; but on discovering the existence of the incumbrance, they may proceed immediately, and on complying with all the provisions of the act, may have the lien extinguished, as to the land occupied by them. *ib*

*See* MASTER AND SERVANT.
PLANK ROADS, 9, 10.

RECEIPT.

*See* CUSTOM.

REDEMPTION.

*See* DEBTOR AND CREDITOR, 6.

REPORT OF REFEREE.

1. Section 272 of the code does not require a referee formally to report on all the issues formed by the pleadings. If there are issues upon which no evidence is given, he need not notice them in his report; *it seems*. *Ingraham* v. *Gilbert*, 151

2. An objection to the report, on that ground, is not available on appeal from the judgment entered upon the report. If a party is dissatisfied with the report of a referee, his remedy is by special motion to set aside or correct the same. *ib*

S

SALE OF CHATTELS.

*See* AGREEMENT, 2, 3.

SAVINGS BANKS.

1. Where moneys deposited with the Knickerbocker Savings Institution, were loaned by such institution to the defendant, upon his promissory note, payable on demand, secured by the hypothecation of 32 shares of the capital stock of the Knickerbocker Bank; *it was held* that the note was not a violation of the charter of the savings institution, nor of the act of April 15, 1853, relative to savings banks in the city and county of New York and the county of Kings. (*Laws of* 1851, *ch.* 100; *of* 1853, *ch.* 257.) *United States Trust Co.* v. *Brady*, 119

2. The 6th section of the act of 1853 was intended to be, and is, only a prohibition against the loaning of the funds of savings institutions on mere personal securities. *ib*

3. A loan, when the note of the borrower, payable on demand, is taken, is not a loan on the *security* of that note. The note is only evidence of the debt. If stock is hypothecated to secure the payment of the note, the loan will be deemed to have been made upon the stock. *ib*

SET-OFF.

In an action against several defendants who are jointly and severally liable, either of them may set off promissory notes executed by the plaintiff, or may avail himself thereof by way of counter-claim. *Briggs* v. *Briggs*, 477

SHIPS AND SHIPPING.

1. In an action against several persons, as joint owners of a vessel, for supplies furnished for the vessel, proof by the plaintiffs that the supplies were delivered on board the vessel, that they rendered a bill thereof to B. one of the joint owners, that it was last seen in his possession and that it had been inspected by the other joint owners, is sufficient, after proving service of the usual notice on B. to produce the bill, and his failure to do so, to authorize parol evidence to be given of its contents. *King* v. *Lowry*, 532

2. Joint owners of a vessel are primarily liable, at all events for supplies furnished in the port to which she belongs, whether all the owners are in such place or not. *Prima facie* their liability is identical with that of persons in the relation of copartners, as joint contractors. *it*

3. But if any one of the owners arrogates to himself the control, to the

exclusion, and against the wishes, of the others, and this assumption is known to the persons furnishing the supplies, thus showing that they act in collusion with the usurping owner, *it seems* the others are not liable. *ib*

4. The mere acceptance by the creditors, of a note, from one of the owners, is no proof, in itself, that the credit was given exclusively to him. Nor will it release the other owners, in the absence of proof that the note was taken as payment, and with the intent to discharge the other owners. *ib*

5. In an action against L., J. & B., as joint owners of a vessel, for supplies furnished for the vessel, at the request of B., proof by L. and J. that B. at the time the debt was contracted, not only acted in hostility to them and their interests, but took exclusive possession and control of the vessel, undertaking a voyage in express contravention of the wishes of the other owners, and that the plaintiffs knew this, is admissible. *ib*

6. But the mere hostility of B. to the other owners, in relation to the vessel and their interests in it, is not relevant, unless it also appears that he usurped exclusive control over the vessel, and undertook a voyage with her in direct opposition to them, and that the plaintiffs were aware of that fact, and acted collusively with him. *ib*

SPECIAL SESSIONS.

*See* PROHIBITORY LIQUOR LAW, 8 to 15.

SUBPŒNA.

1. Where a person goes to the house of another, for the purpose of serving a subpœna upon him, and the latter is in the house at the time, these circumstances amount to a legal license to enter; and if the person having the process finds the outer door open, and enters peaceably, he is lawfully there, and may use such force as is necessary to overcome any resistance he may meet with in the service of the subpœna; being liable only for an excess of violence, beyond what is necessary to overcome the resistance. *Hager* v. *Danforth*, 16

2. The fact that the person having the process is ordered by the wife of the party sought to be served, to leave the house, will not render him a trespasser in proceeding to serve the subpœna. *ib*

SURROGATE.

*See* EXECUTORS AND ADMINISTRATORS, 2, 3, 4, 5, 7.

T

TAXES AND TAXATION.

*See* COMMON SCHOOLS.
MUTUAL LIFE INSURANCE COMPANIES.

TENDER.

A strictly legal tender may be waived by an absolute refusal to receive the money, or do the act required This is upon the principle that no man is bound to perform a nugatory act. *Stone* v. *Sprague*, 509

*See* VENDOR AND PURCHASER, 3.

TITLE TO LAND.

1. In an action to recover damages for the diversion of water from land, of which the plaintiff alleges he is the owner and in the possession, the act done being above his land and the injury consequential, it is not necessary for the plaintiff to prove, in regard to his right or interest, any thing further than that he was in possession of the premises at the time of the injury. *Rathbone* v. *McConnell*, 311

2. The party in possession is the proper person to bring such an action. *ib*

3. The owner, if not in possession, cannot maintain an action, except for an injury to his reversionary in-

terest, and under a complaint presenting such a case. *ib*

*See* COSTS.

TRESPASS.

1. Trespass cannot be maintained by the owner of goods, against a sheriff, for taking them under and pursuant to a writ of replevin against another person having the goods in possession. JOHNSON, J., dissented. *Foster* v. *Pettibone*, 350

2. The law fully recognizes the owner's right, and if he can, without force, obtain the property, will not hold him a wrongdoer for taking it; but it withholds from him an affirmative remedy by action against a ministerial officer; allowing him an action only against other persons concerned in, or who instigated, the taking. *ib*

3. Where cows, belonging to several owners, are found in the garden of an individual, committing a trespass, each owner is liable for the damage done by his own cow and for no more. *Partenheimer* v. *Van Order*, 479

4. And in the absence of all proof as to the amount of damage done by each cow, the law will infer that the cattle did equal damage. *ib*

*See* SUBPŒNA.

TRIAL.

1. Where one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment by the purchaser, of a readiness and willingness to receive and pay *at that place*, in case he sues, for a non-delivery, is indispensably necessary to a good complaint. But if the complaint omits to make that averment, the fact omitted to be averred will, on appeal from the judgment rendered at the circuit, be presumed to have been proved; inasmuch as a readiness and willingness to perform could not be proved, so as to authorize a verdict for the plaintiffs, without also proving a readiness and willingness to do so *at the place*. *Clark* v. *Dales*, 42

2. This is not such a case of *variance* between the complaint and the facts found or proved as will be deemed to affect the substantial rights of the parties. *ib*

3. A single exception to a series of decisions, one of which decisions is correct, is unavailing. *Elton* v *Markham*, 348

4. Where an objection to testimony is taken, on the trial, on a specific ground, and in such a manner as to induce the opposite party to believe that such is the sole ground, the party objecting will not be allowed, on appeal, to place his objection upon a different ground and one which, if it had been urged at the trial, might have been obviated. *Briggs* v. *Smith*, 409

TROVER.

1. In an action commenced under sections 206, &c. of the code, for the claim and delivery of personal property, where the complaint is in the form of the old declaration in replevin in the detinet, and charges that the defendants have become possessed of, and wrongfully detain the goods and chattels, and the plaintiffs proceed upon the ground that the title to the goods was never changed, but remained in them, because the same were purchased of the plaintiffs, and the delivery thereof procured, through the false representations of the vendees as to their solvency and credit, proof of the purchase of the goods by the agent of the defendants, by their direction, and that at that time the defendants were insolvent, is competent evidence, on the question of fraud. *Hunter* v. *The Hudson River Iron and Machine Co.* 493

2. In such an action it is not necessary the complaint should aver a demand of the goods; or that it should contain an allegation of the insolvency of the defendants, or of any of the facts going to establish the fraud. *ib*

3. It is sufficient if it is in the form of the old declaration in replevin in the detinet, and charges that the defendants have become possessed of, and wrongfully detain the goods and chattels in question. *ib*

TRUSTS AND TRUSTEES.

1. *Construction and validity of trusts.*

1. T. conveyed his property to R. by deed, in trust to receive the income and apply it, first, to the payment of his existing debts, and secondly, to the use of his wife and children during his life; and on his death, to convey the fee or capital to his children then in being. *Held* that although the absolute power of alienation was suspended, both by the nature of the trust and by the contingent remainder in favor of unborn children, yet the suspension from either cause could by no possibility continue longer than one designated life in being, and was therefore not contrary to the statute. *Rogers* v. *Tilley*, 639

2. A trust to receive rents and profits, and apply them to the payment of debts, may be satisfied by a sale of the premises for a term of years, taking the whole rent in advance and discharging the debts; and such a sale is not contrary to the statute. *ib*

3. An application of rents and profits, by way of trust, to the use of a man's family, is an application of them to his use, and if confined to the period of his life, and to a living, designated individual, is not contrary to the statute. *ib*

4. Even if this were not so, and the use were to be considered as exclusively that of the wife and children, as it is only, in any event, for their lives, and cannot possibly last longer than the life of the father, which may be a shorter period, it is not contrary to the statute. *ib*

5. If any of the trusts in a deed are valid, the deed is not void. A single good trust is sufficient to sustain it. *ib*

6. A trust in favor of two named children of the grantor and his wife, already born, "and such as may be born of the lawful issue of" the grantor and his wife, means the existing children, and such, if any, as shall be afterwards born, being lawful issue of the grantor and his wife. *ib*

2. *Resulting trusts.*

7. The presumption that he who supplies the money to make a purchase intends it for his own benefit, rather than that of another, does not apply in cases, like that of parent and child or husband and wife, where the purchase may fairly be deemed to have been made for another from motives of natural love and affection. *Welton* v. *Divine*, 9

8. The presumption, in such cases, is that the purchase is intended as an *advancement*, unless the contrary is established by proof. *ib*

9. Therefore where a purchase is made by a husband, and the deed taken in the name of his wife, a resulting trust cannot be established, in favor of the husband, without some evidence to rebut the presumption that the deed was intended as a provision in the wife's favor. *ib*

3. *Liability of trustees.*

10. On the 25th of July, 1838, C. made a general assignment of all his property to W. and N., in trust to sell and convey so much real estate as should be sufficient to pay his debts, and to apply the rents and profits to his support during life. C. was infirm and in debt, and incapable of managing his own affairs at the time of making the assignment. The trustees subsequently sold a portion of the assigned property, called "the Bayside Farm," to S. W. for $15,000, with the knowledge and assent of C., the assignor, and executed a deed to him, in which C. joined. No part of the purchase money was paid, but the purchaser gave his bond for the amount, payable at a future day. The debts not exceeding $8000, C. consented to the sale only on condition that the trustees could find an opportunity to invest the surplus remaining after paying the debts. The trustees accordingly loaned to H. $6000 upon real estate at Newburgh, which sum S. W. consented to advance towards the purchase money, before he obtained possession. The property mortgaged by H. was subject to a prior mortgage of $4000, and was valued at $16,000. C. knew of, and consented to, this loan to H. Subsequently C. died, and the trustees delivered over to B. W. S., his executor, the bond and mortgage taken from H. The executor took no measures to enforce the payment of the interest, or the principal, from H. The prior mortgage was foreclosed, and after satisfy-

ing the same, there was a surplus of $4956 84, which B. W. S. applied for, and obtained, upon H.'s bond and mortgage; leaving due, for principal and interest, to the estate of C. $2502.73; for which a decree in chancery was obtained against H., which still remained due and unpaid. In an action brought by the devisees of C. against the trustees, to recover the amount of that deficiency from them; *Held*, that the trustees had not been guilty of any dereliction of duty, either in selling the property, or in loaning the money to H.; and that consequently they were not liable for the loss which had occurred. *Higgins* v. *Whitson*, 141

11. It cannot be expected from trustees that they should act upon principles different from those which actuate cautious and prudent men in the transaction of their own affairs. Otherwise, the office of a trustee would be one of such hazardous responsibility that no prudent or competent man would ever accept it.. Per CLERKE, J. *ib*

U

UNITED STATES TRUST COMPANY.

1. The charter of the United States Trust Company of New York, is not unconstitutional. *United States Trust Co.* v. *Brady*, 119

2. That company is not a corporation created for banking purposes, within the meaning of section 4 of article 8 of the constitution. *ib*

V

VENDOR AND PURCHASER, (OF CHATTELS.)

1. *Readiness of purchaser to perform.*

1. Where one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment by the purchaser, of a readiness and willingness to receive and pay *at that place*, in case he sues for a non-delivery, is indispensable. But the omission to make this averment is a defect which will be cured by a verdict. *Clark* v. *Dales*, 42

2. And if the plaintiff omits to make the averment, in the complaint, the fact will, on appeal, be presumed to have been proved on the trial; inasmuch as a readiness and willingness to perform could not be proved, so as to authorize a verdict for the plaintiff, without also proving a readiness and willingness to do so *at the place.* *ib*

3. Where there is a mutual obligation on a purchaser to pay the purchase money, and on the vendor to convey the property purchased, an offer and readiness to perform on the part of the purchaser, is sufficient, without tendering a deed ready to be executed by the vendor; especially where the vendor refuses to convey at all. *Stone* v. *Sprague*, 509

2. *Duty of disclosure, by purchaser.*

4. The law does not, in ordinary cases, impose upon a purchaser of property the duty of disclosing to the seller, at or before the sale, the state of his pecuniary circumstances, however desperate they may be, and be known by him to be. *Mitchell* v. *Worden*, 253

5. This general principle is applicable, notwithstanding there has been a long course of dealing between the parties, in the course of which credit has been given to the purchaser, and he has punctually performed his engagements; and his insolvency has occurred during those dealings. *ib*

6. No relation of trust or confidence is thereby created, which should entitle the seller to expect of the purchaser, or require of the purchaser, as a legal duty, to communicate to the seller information of his inability to pay all his debts, while he continues his business and the management of his affairs. *ib*

7. Therefore, although a purchaser at the time of making an additional purchase from persons with whom he has been in the habit of dealing, is insolvent, and he well knows his insolvency, and intentionally conceals it from the vendors, by simply withholding his knowledge on the

subject, without otherwise saying or doing any thing to mislead, and he still retains the possession of property, and is pursuing his business as before, he is not thereby guilty of a fraud, entitling the vendor to avoid the sale. *ib*

8. But if the purchaser, at the time of making a new purchase, is not only insolvent, and knows himself to be so, but has performed an open and notorious act of insolvency, by breaking up his business and assigning his property for the benefit of his creditors, it is his duty, arising out of his previous dealing with the vendors, to communicate that fact to them, before the sale; and the violation of that duty amounts to a fraud. *ib*

3. *Who is a bona fide purchaser.*

9. A person receiving from another property obtained by the fraud of the latter, without paying any thing on account of it, and with notice of facts which render him legally chargeable with knowledge of the fraud, will not be considered a *bona fide* purchaser. *Mitchell* v. *Worden*, 253

4. *Sale and delivery procured by fraud.*

10. A sale and delivery of goods, procured through the false representations of the vendee in regard to his solvency and credit, passes no title whatever to the property, as between the parties; and the vendor may maintain an action, under the code, for the claim and delivery thereof. *Huxter* v. *The Hudson River Iron and Machine Co.* 493

11. In such an action, where it appears that the purchase was made by an agent, it is material for the plaintiff to show not only that the purchaser was insolvent, at the time of the purchase, but that such purchaser, or his agent, or both, knew of such insolvency. Hence the declarations of the agent, to third persons, made by him while acting for his principal and within the scope of his authority, and going to show such knowledge on the part of both principal and agent, are proper evidence. *ib*

12. In an action to recover the possession of a quantity of corn, purchased by the defendant for cash, and delivered to him on the promise of immediate payment, it appeared that the defendant assured the vendor's agent that the money to pay for the corn was arranged for, and that the vendor could have it as soon as the corn was delivered on board a ship; and upon that condition the corn was delivered to the defendant, who, on various pretexts avoided the payment of the money, for several days, and the vessel sailed for Europe, with the corn on board; the defendant on the same day she sailed, executing a general assignment of his property to trustees for the benefit of his creditors, and being insolvent at that time and at the time of the purchase, and having obtained advances upon the bills of lading, and applied them to other purposes. *It was held* that both on the ground of fraud, and of a conditional sale and delivery, the plaintiff was entitled to recover; and a verdict in favor of the defendant was set aside, as being against the weight of evidence, and a new trial was granted. *Van Neste* v. *Conover*, 547

13 Such action will lie, although the goods have been transferred to another, as security for a debt, and are on board ships and not under the manual control of the purchaser when the action is brought. The judgment being in the alternative, for the return of the property or the payment of its value, the defendant, if he has not the property, can satisfy the other requirement of the judgment, and pay the value. *ib*

## W

### WAIVER.

1. The general doctrine that where a party does not appear he waives nothing, is well settled; but this means nothing impeaching the jurisdiction or authority of the court to act, and nothing in the way of objection to the proceedings and the competency or sufficiency of evidence on the part of the plaintiff. This is the extent to which the rule

has been or can properly be carried. *Clark* v *Van Vrancken*, 278

2 With the exception of objections to the jurisdiction, and those which arise upon the proceedings and case of the plaintiff, all objections are waived by an omission to appear and make them in the proper form before judgment. *ib*

3. It is competent for a defendant to waive a technical legal defense grounded on an illegality in which he himself knowingly participated, and to affirm the contract so far as the parties to it were concerned. *Pepper* v *Haight*, 429

4. A defenso that a mortgage is void, for being given upon an illegal consideration, will be waived by the omission to set it up specifically in the answer, and by admitting the validity of the mortgage in the answer and on the trial. *ib*

WAREHOUSEMAN.

*See* WHARFINGER.

WARRANT.

*See* COMMON SCHOOLS.

WHARFINGER.

1 A wharfinger and warehouseman, by holding himself out to the public as such, extends a license to enter upon his premises, to all persons having occasion to do so, in connection with that business. *Bogert* v. *Haight*, 251

2. His employment, however, is a merely private one. He is under no legal obligation to allow the use of his wharf or warehouse to every person applying, even if he has suitable accommodations, and a reasonable reward is offered him; but he may limit the general license, or terminate it, in the case of any particular persons, by giving them notice not to come upon the premises. *ib*

§ And after he has given such a notice to an individual, and thereby revoked the license as to him, an entry of the latter upon the wharf is a trespass, for which an action will lie. *ib*

4. The possession of the premises, by the plaintiff, in such a case, is sufficient evidence of his right to bring the action. *ib*

WILL.

1. *Construction.*

1. A testator, by his will, made in March 1801, gave to his wife the income of his real and personal estate, during her widowhood. He then devised as follows: "I give and bequeath unto my oldest son, Jacob, the corner lot, on the corner of Hester and Elizabeth streets; I also give and bequeath unto my eldest daughter, Barbara, the lot adjoining the corner, facing Elizabeth street; I give and bequeath to my daughter Eliza the lot adjoining the above, facing Elizabeth street; and I also give and bequeath to my youngest son, William, the lot adjoining the above." The testator died in March, 1801, and his son William in August thereafter. After the testator's death, each of his four children claimed and took one lot; the corner lot being called Jacob's, the next south, Barbara's, the next, Eliza's, and the next, William's. In 1823, the widow of the testator conveyed to Jacob all her title to any lands of which her husband died seised or possessed. Jacob then conveyed *in fee* to J. S. the whole of lot No. 137, without any thing to indicate that he was selling an undivided interest only in the lot. In 1822, Barbara, with her husband and the widow, mortgaged lot No. 136 to C. for $550; nothing in the mortgage indicating an intention to pass the title to an undivided share only of the lot. This lot was afterwards sold on a foreclosure of the mortgage, and purchased by C. Before this sale, and after the conveyance by the widow to Jacob, the latter conveyed to J. S. all his "estate, right, title and interest" of, in and to lot No. 136, "being an estate in said Jacob M. for the life of his mother." In 1829, Eliza joined with her husband, A., in conveying the whole of lot No. 135 to P. in fee, with full covenants, and without any intimation that the grantors conveyed, or had

only an undivided interest in that lot. William died an infant, in 1801, and his estate passed to Jacob, Barbara and Eliza. In 1821, Barbara and Eliza, with their respective husbands, joined with the widow, and conveyed to Jacob, in fee, two undivided third parts of lot No. 134, by a deed, with full covenants as to the estate granted, and describing themselves as co-heirs of William, with Jacob. In 1822, Jacob conveyed this lot to P. C. with full covenants, and without any intimation that he conveyed only an undivided share. Barbara died in 1835, leaving six children, one of whom died in 1839. The plaintiff was one of her children. He claimed, that the will gave only a life estate to each child, in each lot; that his mother, on the death of William, was entitled to an undivided third in each lot, in fee; that such right descended to her six children, and on the death of one of them vested in the five survivors; and that the plaintiff was thus entitled to one fifteenth part of lots 136 and 137. *Held*, 1. That, assuming that the will did not convey to each child the fee of the lot devised to him or her, but only a life estate in it, it was plain that each child must have known that it was the intention of the testator to convey the fee. That slight evidence ought to be sufficient in such a case, that they had determined to carry out the real intent of their father, although not expressed according to law. That here was the strongest evidence that they had so determined, and that they carried out this honest determination; every act of theirs showing that determination, and showing it in a manner strictly conformable to law. 2. That if the will did not give a fee to each child in a separate lot, then each child had a life estate in a separate lot, and they were together tenants in common of the reversion in fee, in all the lots, which reversion descended to them as the heirs at law of their father, as real estate not disposed of by his will. 3. That if the doctrine of estoppel could be applied so as to prevent parties disturbing a partition, merely because there had been possession under it, there was much more ground for applying it where, as in this case, each owner had, by his or her deed, claimed to own a separate lot in entirety, and had, under that claim, conveyed the land by deed or mortgage, and subsequent foreclosure, and received from the purchasers the full consideration for the entire title to the lot under this representation, made by all and by each, that each held a lot separately in fee and without any co-tenant. That all the children of the testator, therefore, were estopped now from denying that each held his own lot in fee and in severalty. 4. That if each of the owners had been together when they conveyed, and had at the same time conveyed to the several purchasers, there could be no doubt that they each claimed to hold a lot in severalty, and conceded to the others the like right. Such conveyance would be conclusive evidence of a *partition* previously agreed on; and they, by their acts, causing others to believe it was made, would be estopped from denying it. That the conveyances, made separately and at successive times, equally established the fact of a partition previously agreed on. 5. That it made no difference that Barbara and Eliza were married women. A married woman can no more be allowed to commit a fraud than a single woman. She is competent to know the difference between fraud and honesty, and to understand the obligation not to stand by and allow another to purchase from her on the supposition that she has a perfect title, when she knows she has not. That these acts and deeds of the parties were such evidence of an actual partition between the parties that a jury or court ought to find that there was an actual partition in fact. And that the several deeds and the mortgage confirmed that partition, so as to bind even the married women; the deeds and mortgages having been acknowledged by the latter on a private examination, so as to pass their title. *Mount* v. *Morton*. 123

2. A testator, by his will, devised as follows: "I give and bequeath unto my daughter Mary Roof, the use or interest of $800, for and during her natural life; and at her decease I give and bequeath unto my granddaughter, M. A., $200 of the said $800." The testator subsequently directed his executors to divide among his children and grandchildren, in proporton to the several

legacies bequeathed to them, "the said sum of $600 left at the decease of his daughter Mary, and all the residue and remainder of his estate not otherwise disposed of." After the testator's death, and during the lifetime of Mary Roof, two of the legatees, being married women, with their husbands quitclaimed to R. R., husband of Mary Roof, and to his heirs and assigns forever, "all the right and title which they then had or might thereafter have, to a certain legacy bequeathed to his wife Mary Roof" by the testator. *Held* that the thing released or quitclaimed was only the legacy bequeathed to Mary Roof, which was not the $800 or the $600, but only the *use* or *interest* of $800 for life; the legacy bequeathed to her being only a life estate in the $800, and the legacy given to the other legatees being the reversion in that sum. That such reversion did not pass by the quitclaim and that consequently the executor was not liable to R. R. for the amount of the shares in the $600 which he had paid over to the assignors or releasors, after the death of Mary Roof. CLERKE, J., dissented. *Roof* v. *Fountain*, 527

2. *Execution.*

3. Where the subscribing witnesses to a will subscribe their names at the end of a memorandum of erasures and interlineations which is immediately below the attestation clause, this is a sufficient signature by them. *McDonough* v. *Loughlin*, 238

4. The memorandum is merely a part of the certificate, which, taken together, states that the paper *as altered* was executed by the testator and attested by the witnesses. *ib*

5. Where a testator said to one of the subscribing witnesses, "Mr. McC. [the scrivener] will want you to be a witness to the will;" and the scrivener read the attestation clause to the testator, and asked him whether he wished the persons present to be witnesses to the will, and he said he did: *Held*, that this was a sufficient *request* of the witnesses to become such. *ib*

6. It is not necessary that a testator should himself formally repeat the words. It is enough if he directly and audibly adopts the language of another, used in his presence and hearing. *ib*

3. *Proof of.*

7. The admission and examination of an executor and trustee as a witness to prove the execution of a will, does not annul his appointment of executor, or the legacies to him as a trustee, where nothing is given to him, nor is any appointment conferred upon him, for his own personal use, but all is fiduciary and for the benefit of others. *McDonough* v. *Loughlin*, 238

8. The fact that the donee of a mere naked power may be entitled to a compensation for his services, does not necessarily render him beneficially interested in the execution of the power. *ib*

9. Nor will the circumstance that an executor is entitled to commissions for his services, render him an incompetent witness to establish the will. *ib*

10. Those commissions are allowed by statute, by way of compensation for the executor's services, and are not a gift under the will. *ib*

WITNESS.

1. Where an objection to the competency of a witness examined before a surrogate is not raised there, it will be deemed to have been waived, and will be of no avail on appeal. *McDonough* v. *Loughlin*, 238

2. Where a defendant has no separate defense, in an action on a joint contract, a co-defendant, called as a witness, can prove nothing that will not enure to his own benefit, as well as the benefit of his co-defendant; and as to such matters he is therefore interested, and of course incompetent. *King* v. *Lowry*, 532

WORK AND LABOR.

1. Where one person performs labor for another, the law presumes a request,

and a promise to pay what such labor is reasonably worth, unless it is understood that it is to be performed gratuitously, or it is performed under circumstances which repel the presumption of a promise that compensation shall be made. *Lewis* v. *Trickey*, 387

2. Where an employer agrees to render an equivalent for services performed, it is no defense to an action against him to recover compensation, that he agreed to pay some third person who has no legal claim to the service, or right to the compensation; especially where the defendant does not show that he has in fact paid such third person. *ib*

3. When payment for labor is to be made, the law will give it to him who performs the labor, unless some other person can show a better title. *ib*

*See* OPINIONS OF WITNESSES

END OF VOLUME TWENTY.

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